In the

Supreme Court of the United States

October Term, 1942.

No. 928

PICKERING LUMBER CORPORATION, a corporation,
Petitioner,

vs.

SOPHIA WHITESIDE, ROGER V. WHITESIDE, WILLIAM C. ROBINSON and JOHN D. LAMONT, as Executors of the Last Will and Testament of Robert B. Whiteside, deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE THIRD APPELLATE DISTRICT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Pickering Lumber Corporation, respectfully petitions this Court to grant a writ of certiorari to review the final judgment of the District Court of Appeal for the Third Appellate District of the State of California, being the highest court of that state in which a decision could be had, in the case of Pickering Lumber Corporation,

Plaintiff, Cross-Defendant and Respondent, vs. Sophia Whiteside, Roger V. Whiteside, William C. Robinson and John D. Lamont, as Executors of Robert B. Whiteside, Deceased, Defendants, Cross-Complainants and Appellants, 3 Civil No. 5705, Sac. No. 5418. The judgment sought to be reviewed adjudged that respondents, who were appellants in the court below, were the owners of certain lands and timber located in Tuolumne and Calaveras Counties, California (R. 157) and (R. 447) reversed the judgment of the Superior Court of Tuolumne County, California, the court of first instance, which decreed petitioner to be the owner of the lands free from any right, title, claim or interest of respondents (R. 157).

Petitioner was organized and acquired title to the lands in question in pursuance of a Plan of Reorganization (R. 49, 173) duly confirmed (R. 177, Ex. 20, R. 293) and a Final Decree rendered by the District Court of the United States for the Western District of Missouri (R. 179) in bankruptcy proceedings for the reorganization of Pickering Lumber Company under Section 77B of the Bankruptcy Act (Act of June 7, 1934, Section 1, 48 Stat. 912, as amended by the Act of August 20, 1935, 49 Stat. 644, and as amended by the Act of August 29, 1935, 49 Stat. 965, 11 U. S. C. A., Section 207.

Petitioner's title to the lands thus acquired in the bankruptcy proceedings, which had terminated prior to the institution of this suit, was specifically set up and claimed by it in the court of first instance (*infra*, p. 28; amended cross-complaint, R. 117, 128-135) and was sustained by that court (R. 157-161), but was denied on appeal by the court below in its decision (R. 447; *infra*, p. 16), and by the Supreme Court of California when it denied Petitioner's Application for Hearing After Final Judgment of a District Court of Appeal (R. 459; *infra*, p. 18).

Such right, title, privilege and immunity specifically set up and claimed in the Supreme Court of California (R. 468-492; *infra,* pp. 33-38) was denied on October 26, 1942, when that court refused to hear this case (R. 455). Petitioner also specifically set up and claimed in the court of first instance (R. 719, 128-135; *infra,* pp. 28-31) and the court below (R. 448-454; *infra,* pp. 31-33) and in the Supreme Court of California in Petitioner's Application for Hearing (R. 468-492; *infra,* pp. 33-38) that respondents' claims to the real estate were barred by the Plan of Reorganization and the Final Decree of the bankruptcy court and that such bankruptcy proceedings were *res judicata* of the claims asserted by respondents; and such plea of *res judicata* was denied by the court below (R. 455) and by the Supreme Court of California when it refused to review this case (R. 455).

The Plan of Reorganization (R. 49, 173) as confirmed, made specific provision for the satisfaction of the entire unpaid balance of purchase price (R. 64) on a purchase contract for the real estate in question entered into January 5, 1927, between respondents' decedent, Robert B. Whiteside, and his wife, as vendor, and Pickering Lumber Company as vendee (R. 32, 168). The Plan was accepted by the assignee of the purchase contract (R. 177, 170, Exs. 2, 3, 4 and 5, 184-214) and, in pursuance of the requirements of the Plan (R. 64), the assignee delivered a deed (R. 182, Ex. 1), vesting title to said real estate in petitioner (R. 180). The deed had been executed by Whiteside contemporaneously with the execution and pursuant to the purchase contract (R. 39) and had been held in escrow by the assignee (R. 168). The order confirming the Plan of Reorganization (R. 177, Ex. 20, R. 293, 301-302) and Final Decree barred all claims against Pickering Lumber Company, the debtor, and its property, including those

who had and those who had not filed claims (R. 179, Ex. 25, R. 327, 329). Respondents had notice of all of the proceedings (R. 173, 174, 176), knew of the provisions of the Plan (R. 176, 177), participated in the bankruptcy proceedings before the Final Decree was entered (R. 175, 179), but filed no claim therein (R. 175) and made no challenge either as to the jurisdiction of the bankruptcy court or the adjudication therein made of title and barring of claim. Instead, respondents claims were asserted in this suit subsequently filed.

The court below held that the bankruptcy court did not have jurisdiction to adjudicate title to the real estate which, under the admissions in the pleadings, was in the possession of Pickering Lumber Company on November 30, 1934, when its petition for reorganization was filed in the bankruptcy court, because that court did not have personal jurisdiction over respondents when the Final Decree was rendered (R. 434, 441-446). This conclusion was based on the erronous premise that Respondents' intervention was dismissed prior to the entry of the final decree when both the record (R. 332, 333) and the stipulation of facts (R. 180) show that such dismissal and final decree were entered simultaneously on the same day. Furthermore, this holding was made in the face of admitted facts that respondents had appeared in the bankruptcy court at the hearing upon the fairness and feasibility of the Plan of Reorganization and in open court had expressed approval of the Plan (R. 175), and of the admitted facts that respondents intervened in the bankruptcy proceedings in aid of the execution of the Plan of Reorganization (R. 179), and in such intervening petition respondents neither challenged the jurisdiction of the court nor did they in any way limit their appearance (Ex. 23, R. 310).

The court below held that, if the bankruptcy court

had jurisdiction of respondents, the Plan of Reorganization and Final Decree providing for the vesting of title in petitioner would have been effective to bar respondents, but that, inasmuch as the respondents were not parties to the "compromise plan or purported accord and satisfaction," its proceedings were ineffective to bar respondents' claim of title (R. 441-444). Petitioner's plea of *res judicata* was rejected upon the ground that respondents were not parties to the bankruptcy proceeding (R. 444-446).

The date of the rendition of the judgment sought to be reviewed and the date petition for certiorari is presented.

The date of the rendition of the judgment sought to be reviewed is August 29, 1942 (R. 447). It became final in the District Court of Appeals on September 28, 1942.[1] For purposes of review in this Court it became final when the Supreme Court of California, on October 26, 1942, denied Petitioner's Application for Hearing After Final Judgment of a District Court of Appeal (R. 455).[2]

This petition for certiorari is presented to this Court on the date the same is filed with the clerk of this Court.

A certified copy of the record, including the proceedings in the District Court of Appeal for the Third Appellate District of California and the proceedings in the Supreme Court of California, and additional copies of said record and proceedings, as required by Rule 38 of the Rules of this Court, have been filed with the clerk of this Court.

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[1]See Appendix, pp. 16-17, IV.

[2]That the judgment sought to be reviewed was final and was rendered by the highest court in the state in which a decision could be had is shown *infra*, pp. 16-18.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The Nature of the Case.

This suit was instituted by Petitioner in the Superior Court of Tuolumne County, California, on the 27th day of May, 1937 (R. 1), against Respondents in conventional statutory form, to quiet title to the lands in question. Respondents filed a cross-complaint asserting title to the lands (R. 8, 31). In its amended answer to the cross-complaint (R. 117), Petitioner alleged that it had acquired title to the lands by the Plan of Reorganization and final decree entered by the District Court of the United States for the Western District of Missouri in the bankruptcy proceedings for the reorganization of Pickering Lumber Company (hereinafter called the "Debtor"), that the claims of Respondents to said lands were barred by the order confirming the Plan of Reorganization and final decree, and that the latter were *res judicata* of the claims of the Respondents to the lands as set up in the cross-complaint.[1]

The Superior Court sustained Petitioner's claim to title and plea of *res judicata* (R. 157, 161), but on Respondents' appeal (R. 162) the court below held that the bankruptcy court had no jurisdiction to adjudicate the title in Petitioner and that the Plan of Reorganization, as confirmed, and the Final Decree were not *res judicata* of Respondents' claims to the real estate (Appendix, pp. 1, 7-16).

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[1]The stage in the proceedings in the court of first instance and in the appellate courts and the manner in which the federal questions sought to be reviewed were raised and the way that they were passed upon by the courts below is specifically dealt with (*infra*, pp. 28-42).

The Facts.

There are no controverted facts because at the trial in the Superior Court the parties filed a stipulation of facts (Ex. 1, R. 168) from which, together with the admissions in the pleadings, the facts hereinafter stated were all admitted. Except when otherwise stated, the facts herein referred to are set out in the stipulation which is Exhibit 1 (R. 168).

On November 30, 1934, when the Debtor filed its petition for reorganization under 77B of the Bankruptcy Act in the District Court of the United States for the Western District of Missouri (R. 171) it was in possession of the real estate in question (petition R. 2, answer and cross-complaint, R. 9), which it had purchased from Respondents' decedent, Robert B. Whiteside, and his wife, under a purchase contract dated January 5, 1927 (Ex. A to cross-complaint, R. 32, 168).

By the purchase contract, Whiteside agreed to sell the lands in question to the Debtor for total aggregate payments of $1,804,400, of which $404,400 was paid in cash upon the execution of the contract (R. 33), $600,000 additional was to be paid by the assumption by the vendee of an existing indebtedness of Whiteside secured by a first mortgage on the lands covered by the contract (R. 34) and the balance of $800,000 was to be paid in four annual installments of $200,000 each (R. 33). The purchase contract provided that the Debtor should be entitled to possession of the lands forthwith (R. 36), and it was admitted by the pleadings that the Debtor had possession from and after the execution of the contract (petition R. 2, answer and cross-complaint R. 9).

Contemporaneously with the execution of the purchase contract, Whiteside and his wife executed a deed conveying the lands to the Debtor and delivered the same to the

First National Bank of Duluth, Minnesota (Ex. A attached to cross-complaint, R. 32, 39, 168-9, Ex. 1, R. 182) (afterwards consolidated under the name of First and American National Bank of Duluth (R. 169), hereinafter called the "Duluth Bank"), which was to be kept in escrow and to be delivered to the Debtor by the Duluth Bank when the entire purchase price fixed by the purchase contract had been paid (Ex. A to cross-complaint, R. 39).

On January 5, 1928, Whiteside borrowed $400,000 and on July 5, 1928, he borrowed an additional $200,000 from the Duluth Bank and to evidence such loans he executed his notes (R. 170-1).

When the first loan was made Whiteside executed two instruments, one a collateral trust agreement and the other an assignment conveying to the Bank $400,000 of the annual installments of the unpaid purchase price under the purchase contract and when he made the second loan he executed two other instruments of like character under which he conveyed to the Duluth Bank $200,000 of the annual installments of the unpaid purchase price under the purchase contract (R. 170). All four instruments together conveyed to the Duluth Bank as trustee the entire amount of the unpaid purchase price under the purchase contract, exclusive of the assumption of the payment of Whiteside's debt secured by the first mortgage on the land (Ex. 2, R. 184, Ex. 3, R. 206, Ex. 4, R. 307, Ex. 5, R. 213). These assignments and instruments assigned all of the rights conferred upon Whiteside by the purchase contract insofar as the same may be necessary or applicable to enforce payment by Debtor of the entire unpaid balance of the purchase price (R. 206, 213).

On Whiteside's death, in 1931 (R. 169), Respondents qualified as Executors under his will both in Minnesota

and in California (R. 169-70). Under the laws of California, they were authorized to assert and defend title to real estate owned by their decedent.[1]

When Debtor filed its petition for reorganization on November 30, 1934, there was unpaid on the purchase contract $300,000 principal amount, together with accrued interest, which was identically the same as the amount unpaid on the Whiteside notes for which the purchase contract had been assigned to the Duluth Bank (R. 170).

At the time of the institution of the bankruptcy proceedings, $200,000 principal amount of the notes issued by Whiteside had been assigned to the Noteholders' Protective Committee for which the Duluth Bank acted as Trustee under the assignment and $100,000 principal amount was then owned by the Duluth Bank (R. 171-2). As the owner of $100,000 principal amount of the notes the Duluth Bank filed claim in the bankruptcy proceedings upon $100,000 of the unpaid balance of the purchase contract, with interest (R. 174), and, as trustee and assignee of the purchase contract, it filed a claim in the bankruptcy proceedings for $300,000 principal amount, plus interest (R. 174), being the total unpaid balance of the purchase contract and the entire unpaid balance of the Whiteside notes. The Noteholders' Protective Committee, as holder of $200,000 principal amount of Whiteside notes, filed a claim in the bankruptcy proceedings upon $200,000 of the unpaid balance of the purchase contract (R. 174-5). The bankruptcy court allowed the claim of the Duluth Bank as an individual in the sum of $100,000 and interest, and the claim of the Noteholders' Protective Committee in the sum of $200,000 and interest, as Class 3 claims (R. 177).

Before the Plan of Reorganization was filed the bankruptcy court made an order classifying claims in which

[1]Appendix, p. 16, II.

claims for the balance due under the purchase contract were designated as Class 3 (R. 223). In paragraph 2 of Class 2 of the classifying order provision was made for the discharge of the first mortgage which Debtor had assumed in the purchase contract (Ex. 9, R. 223). That mortgage, in accordance with the duly confirmed Plan of Reorganization was satisfied (R. 182).

The Plan of Reorganization (Ex. B to cross-complaint, R. 49) in express terms dealt with all assets, liabilities, securities, debts and interest of, in and against the Debtor (R. 52) and provided that a new corporation be organized (R. 56) which would take title to all property of the Debtor (R. 56). Pursuant to the latter provision Petitioner was incorporated (R. 180).

Under the heading "Secured Creditors" (R. 52) and the subheading "Creditors Holding Junior Liens" (R. 53), in the Plan of Reorganization, there was described the unpaid balance on the purchase contract in the principal amount of $300,000, together with accrued interest to December 1, 1934, in the sum of $52,250 (R. 53). Under the heading "Distribution of Securities—Secured Creditors" (R. 63) and the subheading "Creditors Holding Junior Liens C. Claims Arising on Notes of R. B. Whiteside," for which the entire unpaid balance of the purchase contract had been assigned by the instruments of assignment, the Plan of Reorganization provided:

> "These notes were made subsequent to the execution of the contract by which the company agreed to purchase the Whiteside tract and are secured by a pledge of said contract. The holders of these notes will receive income bonds, Series 'B,' in the sum of $105,000, 1,950 shares of Convertible Preferred Stock and 3,000 shares of Common Stock and will transfer title to the Whiteside tract to the reorganized company" (R. 64).

The Duluth Bank, both as trustee and as an individual claimant, and the Noteholders' Protective Committee filed written acceptances of the Plan of Reorganization (R. 177-8). Respondents filed no claim in the bankruptcy court and, except by filing an intervening petition hereinafter mentioned (R. 179), filed no formal written acceptance of the Plan of Reorganization.

At the hearing in the bankruptcy court upon the fairness and feasibility of the Plan, and before confirmation thereof, Respondents appeared and in open court expressed approval of the Plan of Reorganization (R. 175). By its order entered after hearing the court determined that the Plan of Reorganization was feasible, fair and equitable and did not discriminate in favor of or against any creditors or stockholders and that it complied with all of the applicable provisions of Section 77B of the Bankruptcy Act (R. 175-176, Ex. 17, R. 282, 283).

On February 19, 1937 (R. 177), the court made an order confirming the Plan of Reorganization (R. 177, Ex. 20, R. 293) which provided that the Plan of Reorganization and the provisions of such order be binding on the Debtor, all stockholders thereof and all creditors of the Debtor, whether secured or unsecured, whether or not affected by the Plan, whether their claims were *ex contractu* or *ex delicto,* whether their claims had been filed or not, and including claims of creditors who have not filed claims (R. 301-302). In the order the court found that the Plan had been accepted by stockholders and creditors in each class sufficient to authorize confirmation thereof (R. 300).

The Series "B" bonds, convertible preferred stock and common stock issued by Petitioner as prescribed by the Plan were distributed to the Duluth Bank and the Noteholders' Committee in satisfaction of claims for the entire unpaid balance on the purchase contract (R. 181), and the

balance due on the first mortgage assumed by the Debtor in the purchase contract was fully satisfied by payment thereof as prescribed by the Plan (R. 181-2, Ex. "B" attached to cross-complaint, R. 49, 64).

By its Final Decree (R. 179, Ex. 25, R. 327) the reorganization court (1) directed delivery of the escrowed deed to Petitioner (R. 331), (2) adjudged that each and all of the provisions of Section 77B touching the proceedings and all orders of the court had been duly complied with (R. 329), and (3) decreed that all creditors and stockholders of the Debtor be perpetually restrained and enjoined from instituting, prosecuting or pursuing any suits or proceedings on any claim (R. 330), and that the title to all of the assets be vested in Petitioner, free and clear of any lien or claim of any kind or nature (R. 331).

Notices were given from time to time during the course of all of the bankruptcy proceedings to all stockholders and creditors of all hearings upon all matters coming up before the court during the pendency of such proceedings and of all orders entered therein (R. 173, Ex. 9, R. 219, Ex. "B," 227, R. 174, Ex. 10, R. 238, R. 176, Ex. 17, R. 282, 283, 284).

The Intervention of Respondents in the Bankruptcy Proceedings.

On March 13, 1937 (R. 179), Respondents appeared generally and filed an intervening petition in the bankruptcy proceedings (R. 179, Ex. 23, R. 310), stating that they desired that the Plan of Reorganization be carried out in accordance with its terms (R. 323). They alleged that after a conference had been held between the Bondholders' Committee representing the first mortgage bonds of the Debtor, the Noteholders' Protective Committee, and the Duluth Bank (R. 314), the Noteholders' Protective

Committee, by letter to the Bondholders' Committee, in which the Duluth Bank and the Respondents joined, proposed an agreement to the terms of the Plan of Reorganization in so far as such provisions applied to them, subject to the approval of the Probate Court of St. Louis County, Minnesota (R. 314-315). It was further alleged that pursuant to an application by Respondents to the Probate Court of St. Louis County, Minnesota (R. 317), the Probate Court had made an order authorizing the Respondents to direct the Duluth Bank to deliver the escrowed deed when Detroit Trust Company, whose claim had been allowed against the estate in the Probate Court in the sum of $313,400 on September 29, 1932, and when the Duluth Bank, whose individual claim had been allowed against the estate in the amount of $106,986.30 on March 6, 1933, and the Noteholders' Protective Committee's claim which had been allowed on the same date for the sum of $212,808.22, shall have satisfied and discharged their claims (R. 318-319). The claim of Detroit Trust Company was based on the balance due on the first mortgage which, as above stated, was satisfied afterward in accordance with the Plan of Reorganization.

The order of the Probate Court (R. 176-7, Art. XVII of cross-complaint, R. 24) recited that the court did not assume jurisdiction over any claimants, and did not by its order adjudicate any rights of either the Detroit Trust Company or the Duluth Bank and that the order was not to be considered as prejudicing their rights as estate creditors (R. 25).

It was further alleged in the intervening petition that the Duluth Bank had advertised for sale the purchase contract pursuant to the terms of the two collateral trust agreements authorizing such sale (R. 320-321), the unpaid

balance on the purchase contract being the same as the unpaid balance on the Whiteside notes.

The relief prayed for was

(a) That the Duluth Bank, as trustee, be directed to satisfy its two claims allowed in the probate court;

(b) That the Duluth Bank, as escrowee of the deed, be directed to deliver the same, together with the $300,000 principal amount of Whiteside notes, to the trustees of the Debtor upon issuance to the persons entitled thereto of the income bonds, convertible preferred stock and common stock, as provided by the Plan of Reorganization;

(c) That the court make an order staying the sales pending a full and complete hearing;

(d) That the Duluth Bank, as trustee, be enjoined from selling the indebtedness transferred and held by it as security for the Whiteside notes; and

(e) That the Duluth Bank be directed to perform such acts necessary and proper for the consummation and carrying out of the Plan of Reorganization in so far as the same provided for action and performance upon its part (R. 324-325).

At the hearing of the intervening petition in the bankruptcy court on March 17, 1937, Respondents and other parties appeared and the court made an order in which it temporarily enjoined the threatened sale and reserved jurisdiction to hear and determine all matters set forth in the intervening petition in so far as it had jurisdiction to do so at the time of hearing upon the Final Decree to be entered in the reorganization proceedings or at such

other time as the court might fix (R. 179, Ex. 24, R. 326, 327).

Subsequently, the hearing on the Final Decree and upon the intervening petition were heard together, after which the court made two orders simultaneously on the 27th day of March, 1937 (R. 179-180), (1) the entering of its Final Decree, and (2) an order disposing of Respondents' intervention. Both by the record (Ex. 25, R. 332, Ex. 26, R. 333) and by stipulation of the parties (R. 180) such order and Final Decree were entered simultaneously on March 27, 1937.

The order entered on the intervention provided that the previous order of the court staying the sales was reaffirmed, and stated:

> "It appearing to the court that the other controversies involved in said intervening petition were more properly cognizable in the courts of Minnesota, it is further ordered that except as above provided said intervening petition be and it hereby is dismissed without prejudice, however, to the rights of said interveners and said respondents with respect to matters and things alleged in said intervening petition." (Ex. 26, R. 332-333.)

The Final Decree entered (Ex. 25, R. 327) contemporaneously with the order on the intervention discharged the Debtor from its debts and liabilities (R. 329), except as provided in the Plan of Reorganization, directed that the Duluth Bank (which held the deed conveying to Debtor the lands described in the purchase contract) should deliver the deed to Petitioner (R. 331), that the securities to be issued as required by the Plan should be held in lieu of the purchase contract and all payments due thereunder (R. 331), and that Petitioner should be vested with the title to all properties of the Debtor (R. 331).

The Judgment Below Sought to Be Reviewed was Final and was Rendered by the Highest Court of the State of California in which a Decision Could be had.

The District Court of Appeal reversed the judgment of the Superior Court directing that a judgment be entered adjudging Respondents to be the owners and holders of title to the lands described in the complaint, subject, however, to a lien thereon for any unpaid remainder of the Whiteside notes and subject, further, to the terms and conditions of the purchase contract (R. 447). Such judgment became final October 26, 1942, when the Supreme Court of California declined to hear the case (R. 455).

From the judgment rendered for Petitioner and against them by the Superior Court of Tuolumne County, California (R. 157), Respondents appealed to the Supreme Court of California (R. 162) under Section 4 of Article VI of the Constitution of California,[1] which provides that the Supreme Court of the state shall have appellate jurisdiction in all cases which involve the title or possession of real estate.

The Supreme Court of California, in pursuance of Section 4c of Article VI of the Constitution of California,[2] transferred the cause to the District Court of Appeal for the Third Appellate District of California (R. 433).

After hearing, the District Court of Appeal entered judgment on the 29th day of August, 1942, reversing the judgment of the Superior Court (R. 447). The opinion is reported 54 Advance Calif. App. Reports 290, 128 Pac. (2d) 899, and is printed in full in the Appendix.[3] Such judgment became final in the District Court of Appeal on

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[1]Appendix, p. 16, III.
[2]Appendix, p. 16-17, IV.
[3]Appendix, pp. 1-16.

the 28th day of September, 1942, by virtue of a provision of Section 4c of Article VI of the Constitution of California.[4]

On the 16th day of September, 1942, after service on respondents (R. 494), petitioner filed an Application for Rehearing in the District Court of Appeal (R. 448) pursuant to Section 1 of Rule XXX of the Supreme Court and District Court of Appeal of California[5], effective September 8, 1942, which permits the filing of such an application and requires that it be filed within twenty days after the judgment has been pronounced.

On the 28th day of September, 1942, the District Court of Appeal denied Petitioner's Application for Rehearing without opinion (R. 455).

On the 7th day of October, 1942 (R. 459), and within nine days after the judgment of the District Court of Appeal had become final in that court, Petitioner filed in the Supreme Court of California a printed Application for Hearing After Final Judgment of a District Court of Appeal (R. 459), in which it was prayed that the case be heard and determined by that court, and there was embraced therein a statement of the grounds upon which necessity for hearing was claimed to exist (R. 460) and specifically setting up and claiming the right, privilege and immunity of Petitioner under Section 77B of the Bankruptcy Act (R. 473) and that the Plan of Reorganization and Final Decree were *res judicata* as to Respondents' claims (*infra,* pp. 33-38; R. 475, 482-492); and which application was accompanied by a copy of the opinion of the District Court of Appeal in said cause (R. 493, 434, side page 784), showing the date of filing thereof, together with proof of service on Respondents prior to the filing of said application and proof of service

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[4]Appendix, pp. 16-17, IV.
[5]Appendix, p. 17, V.

thereof (R. 495). Said application was permitted and authorized and was filed pursuant to Sections 3[6] and 6[6] of the Rules of the Supreme Court and District Court of Appeal of the State of California and pursuant to Section 4c of Article VI[7] of the Constitution of California.

On the 26th day of October, 1942, the Supreme Court of California, being the highest court of the state, overruled said Application for Hearing After Final Judgment of a District Court of Appeal, without opinion, thereby refusing to hear said cause, and said judgment on said date thereupon became final (R. 455).

II.

STATEMENTS PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE COURT BELOW.

The Statutory Provision Believed to Sustain this Court's Jurisdiction.

This Court has jurisdiction to issue the writ of certiorari pursuant to subsection (b) of Section 237 of the Judicial Code, as amended (Section 344, Title 28, U. S. C. A., Section 1, 43 Stat. 937), which provides that:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had • • • where any title, right, privilege, or immunity is specially set up or claimed by either party under the

[6]Appendix, pp. 17, 18, VI, VII.
[7]Appendix, pp. 16, 17, IV.

Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States * * *."

The Statute of the United States or Commission or Authority exercised under the United States under which Title, Right, Privilege or Immunity was set up or claimed by Petitioner.

The Statute of the United States under which the title, right, privilege or immunity as specifically set up and claimed by Petitioner was denied and the validity of which is involved is Section 77B of the Bankruptcy Act of June 7, 1934, c. 424; Section 1, 48 Stat. 912; Act of August 20, 1935, c. 577, 49 Stat. 664; Act of August 29, 1935, c. 809, 49 Stat. 965; Act of August 12, 1937, c. 589, Section 1, 50 Stat. 622, the pertinent provisions of which are as follows:

Subsection (e) (1):

"A plan of reorganization shall not be confirmed until it has been accepted in writing, whether before or after the filing of the petition or answer under this section, and such acceptance shall have been filed in the proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan * * *."

Subsection (b):

"A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; * * * (9) shall provide adequate means for the execution of the plan, which may include the transfer of all or any part of the property of the debtor to another corporation * * * the satisfaction or modification of liens * * * and the issuance of securities

of either the debtor or any such corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; (10) may deal with all or any part of the property of the debtor and may include any other appropriate provisions not inconsistent with this section * * *. The term 'creditors' shall include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this title. The term 'claims' includes debts, securities other than stock, liens, or other interests of whatever character."

Subsection (g):

"Upon such confirmation the provisions of the plan and of the order of confirmation shall be binding upon (1) the debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors, secured and unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."

Subsection (h):

"Upon final confirmation of the plan, the debtor and other corporation * * * organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto * * * and the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the * * * other corporation * * * provided for by the plan * * * shall be free and clear

> of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance * * * and the court may direct * * * the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance * * *. Upon the termination of the proceedings a final decree shall be entered * * * closing the case. Such final decree shall discharge the debtor from its debts and liabilities * * * except as provided in the plan or as may be reserved as aforesaid."

The court below denied Petitioner's right, title, claim, interest and immunity under Section 77B of the Bankruptcy Act as specifically set up and claimed in Petitioner's plea that title to the lands in question were vested in it because of the statute and the bankruptcy proceedings conducted thereunder, and by denying that Respondents' claims to title to the lands as asserted in this case were *res judicata* because of the Plan of Reorganization, as confirmed, and the Final Decree rendered by the bankruptcy court in the bankruptcy proceedings.

This Court has jurisdiction to review the judgment of the court below under Section 237(b) of the Judicial Code, as amended, because of the denial by that court of the right, title, privilege and immunity specifically set up and claimed by Petitioner under Section 77B of the Bankruptcy Act and the denial by the court below of Petitioner's plea of *res judicata* that the orders and Final Decree of the bankruptcy court were conclusive as to the claims of title asserted by Respondents in this case.

III.

QUESTIONS PRESENTED AND THE REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT, AND STATEMENT OF GROUNDS UPON WHICH IT IS CONTENDED THAT THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

The Questions Presented.

The questions presented for the determination of this Court are:

1. Did the Plan of Reorganization, as confirmed, and the Final Decree entered by the bankruptcy court in the bankruptcy proceedings of Pickering Lumber Company vesting title to the lands in question in Petitioner and barring Respondent's claims constitute a final adjudication of Respondents' claims to the real estate asserted in this case when the admitted facts disclose (a) that the real estate was in the possession of the Debtor when its bankruptcy petition was filed, (b) that Respondents had notice of the proceedings and appeared generally in such bankruptcy proceedings, and (c) that Respondents in the bankruptcy proceedings made no challenge either as to the jurisdiction of the bankruptcy court or as to the validity of its adjudication?

2. May Respondents in this suit, which was filed subsequent to the termination of the bankruptcy proceedings, successfully maintain that the bankruptcy court had no jurisdiction to adjudicate title in Petitioner to the real estate in possession of the bankruptcy court and to bar Respondents' claims with reference thereto when Respondents, who admittedly received notices of the hearings in the bankruptcy proceedings and appeared therein but filed no claim, made no challenge in the bankruptcy proceedings to the exercise of jurisdiction by that court

and took no appeal from the order of confirmation or from such Final Decree of the bankruptcy court?

3. Is the determination of its jurisdiction by the bankruptcy court to adjudicate title to the real estate and to bar Respondents' claims thereto subject to successful challenge by Respondents in this case subsequently filed when, under the admitted facts disclosed by the record in this case, the real estate was in the custody of the court, Respondents participated in the bankruptcy proceedings, had full knowledge of such intended adjudication and made no challenge to the exercise of such jurisdiction by the bankruptcy court and took no appeal from the order of confirmation or from such Final Decree?

4. Were Respondents parties to the bankruptcy proceedings because of the notices which were admittedly given to them and their unreserved appearance in the bankruptcy court in the bankruptcy proceedings?

5. May Respondents successfully maintain in this suit, filed subsequent to the termination of the bankruptcy proceedings, that the order dismissing their intervening petition in part entered simultaneously with the Final Decree, had the effect of terminating their relation to the bankruptcy proceedings as parties so that the Final Decree of the bankruptcy court did not bind them?

6. Is the adjudication of title in Petitioner and the barring of Respondents' claims to the real estate by the bankruptcy court in the Plan of Reorganization and Final Decree conclusive and not subject to challenge by Respondents in this suit filed subsequent to the termination of the bankruptcy proceedings, when the admitted facts disclose that the bankruptcy court had before it as parties the Duluth Bank as escrowee of the deed and as assignee of the purchase contract, the Noteholders' Protective Committee, *cestui que trustent,* and Respondents, who were all

of the claimants to the real estate, and none of whom challenged such adjudication in the bankruptcy proceedings?

7. May Respondents in this suit, filed subsequent to the termination of the bankruptcy proceedings, successfully challenge the adjudication of the bankruptcy court that the Duluth Bank and the Noteholders' Protective Committee, by virtue of the instrument of assignment assigning the entire unpaid balance on the purchase contract to it in its individual capacity and as trustee for the Whiteside noteholders, executed by Respondents' decedent, were vested with authority to file claim for the entire unpaid balance on the purchase contract and to accept such Plan of Reorganization, thereby binding Respondents and to have such purchase contract obligation satisfied and discharged by the delivery of the securities to the Duluth Bank, as provided in the Plan of Reorganization?

8. The effect of the bankruptcy adjudication being that the entire interest of Respondents' decedent in the purchase contract was assigned to the Duluth Bank and it was clothed with authority to collect the entire unpaid balance on the purchase contract, and its claim therefor having been fully satisfied in the bankruptcy proceedings, are Respondents, who had notice of the bankruptcy proceedings and who participated therein, barred from asserting any claims to the real estate in this case filed subsequent to the termination of the bankruptcy proceedings?

9. May the court below in this case, which was instituted subsequent to the termination of the bankruptcy proceedings, determine the case the same as if it were an appellate court and thereby subject the bankruptcy proceedings to such review and consideration as if the bankruptcy proceedings were before it upon appeal or other direct review?

The Reasons Relied Upon for the Allowance of the Writ.

This Court has jurisdiction under Section 237(b) of the Judicial Code, as amended, to grant certiorari because the decision and judgment of the court below denied Petitioner a right, title, interest, privilege and immunity under Section 77B of the Bankruptcy Act (Title 11, U. S. C. A., Section 207) and under the orders and Final Decree of the bankruptcy court in the bankruptcy proceedings for the reorganization of Pickering Lumber Company conducted under authority of such statute, as specifically set up and claimed by Petitioner. The jurisdiction of this Court to grant certiorari on such ground is sustained by the following decisions:

Stoll v. *Gottlieb*, 305 U. S. 165, 167;
Davis v. *Aetna Acceptance Corp.*, 293 U. S. 328;
Connell v. *Walker*, 291 U. S. 1;
Danciger & Emerich Oil Co. v. *Smith*, 276 U. S. 542;
Myers v. *International Trust Co.*, 273 U. S. 380;
Jones Nat'l Bank v. *Yates*, 240 U. S. 541;
Harrigan, Trustee, v. *Bergdoll*, 270 U. S. 560;
Nutt v. *Knut*, 200 U. S. 12;
Rankin v. *Barton*, 199 U. S. 228;
Fischer v. *Pauline Oil Co.*, 309 U. S. 294;
Lesser v. *Gray*, 236 U. S. 70;
Seabury, Receiver, v. *Green*, 294 U. S. 165;
Williams v. *Heard*, 140 U. S. 529, l. c. 535;
Rector v. *City Deposit Bank*, 200 U. S. 405;
Eauclaire Nat'l Bank v. *Jackman*, 204 U. S. 522;
Motlow v. *State ex rel. Koeln*, 295 U. S. 97, 98;
Pittsburgh, C., C. & St. L. Ry. Co. v. *Long Island Loan & Trust Co.*, 172 U. S. 493, 507.

In denying Petitioner's defense that the Plan of Reorganization, as confirmed, and the Final Decree entered in the bankruptcy proceedings barred Respondents from

asserting any claims to the real estate and that such Plan of Reorganization and Final Decree were *res judicata* of the rights asserted and claimed by Respondents in this suit, the court below denied to Petitioner a right, title, interest and immunity which depended upon Section 77B of the Bankruptcy Act and an order of confirmation and a Final Decree of a District Court of the United States rendered in proceedings conducted pursuant thereto. This Court is thereby given jurisdiction to grant certiorari under subsection (b) of Section 237 of the Judicial Code, as amended. The authorities *supra* sustain such jurisdiction.

Statement of Grounds upon which it is contended that the Questions Involved are substantial.

The questions involved are substantial, not only as to the rights of Petitioner derived from the pertinent bankruptcy statutes and the bankruptcy proceedings but because of their paramount public importance. The court below has refused to give effect to a confirmed Plan of Reorganization and a final decree of a bankruptcy court adjudicating title to real estate in Petitioner and barring Respondents' claims thereto, when the admitted facts disclose that the real estate was in the possession of the bankruptcy court and all persons having claims thereto were parties to the proceedings. The court below has sustained Respondents' collateral attack on the order of confirmation and the Final Decree of the bankruptcy court and has denied Petitioner's plea that the bankruptcy proceedings adjudicated all of Respondents' claims so that they could not be asserted subsequently in this suit.

The court below has ruled that the bankruptcy proceedings were ineffective to discharge obligations for which specific provision was made in the Plan of Re-

organization and which has been satisfied in accordance with the provision so made. Contrary to specific provision in the order confirming the Plan of Reorganization and Final Decree, the court below in its decision of this case held that Respondents' claims to the real estate were not affected thereby. The court below has held that Respondents, who had notice of the proceedings, who participated therein and intervened, were not parties to the proceedings when the Final Decree was entered because their intervening petition, which made no reservation of jurisdiction, was dismissed in part, and that, as a consequence, the bankruptcy court's jurisdiction over Respondents terminated with the dismissal in part of the intervening petition so that the Respondents were not bound by the Final Decree entered contemporaneously with such dismissal.

The bankruptcy court had determined its jurisdiction and had adjudicated rights of parties to the proceedings, but under the ruling of the court below such adjudication is subject to challenge by a state court whenever the bankruptcy decree is invoked. Thus the questions litigated in the bankruptcy court must be relitigated at the instance of any creditor or stockholder, and not until the gamut of creditors and stockholders is run is it known what effect, if any, the bankruptcy adjudication had. The rights conferred by the federal statute and the bankruptcy proceedings conducted thereunder are thereby denied because the probability of such rights being given effect depends ultimately upon the decision of a state court and not upon the statute or order of confirmation or the final decree of a federal bankruptcy court.

If a state court may thus deal with Section 77B of the Bankruptcy Act and the final decree of a bankruptcy court, then the objectives of Congress in enacting the

statute to rehabilitate debtors by freeing them from burdensome obligations have been frustrated and proceedings of a bankruptcy court are of no effect until their validity has been sustained by a state court. It is difficult to conceive of a more effective method of avoiding Section 77B of the Bankruptcy Act and denial of rights expressly conferred in proceedings conducted in pursuance thereof.

This Court should grant the writ of certiorari because (1) the court below has denied a right, title, privilege and immunity specifically set up and claimed by Petitioner under Section 77B of the Bankruptcy Act and Petitioner's defense of *res judicata* of the orders and Final Decree of the bankruptcy court to Respondents' claims asserted in this case and (2) the questions involved are of importance in the administration of the bankruptcy statutes.

IV.

THE STAGE IN THE PROCEEDINGS IN THE COURT OF FIRST INSTANCE AND APPELLATE COURTS IN WHICH AND THE MANNER IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE SPECIFICALLY SET UP AND CLAIMED, AND THE WAY THEY WERE PASSED ON BY THE COURTS BELOW.

The Stage in the Proceedings and the Manner in which the Federal Questions Sought to be Reviewed were specifically Set Up and Claimed.

A.

In the Court of First Instance.

In its amended answer to the cross-complaint (R. 117) Petitioner specifically alleged the Plan of Reorganization, its acceptance and confirmation, the final decree, the order classifying claims, the intervention and the proceedings pursuant thereto, and all other pertinent proceedings of the

bankruptcy court (R. 117-118, 128-135). It was alleged also that there was a final discharge of the purchase contract and title to the lands were vested in Petitioner because of the Plan and final decree (R. 127, 135). It was further asserted that the final decree and Plan of Reorganization were *res judicata* to all of Respondents' claims of title as were asserted by it in its cross-complaint. In addition to the allegation of specific facts, the plea of *res judicata* was specifically set up and claimed by the following allegations of the amended answer.

> "Said (final) decree constituted a final judgment entered by a court of competent jurisdiction in a suit to which this plaintiff was privy as successor to Pickering Lumber Company, and in which these defendants were parties, and by said final decree it has been finally adjudicated that the defendants have no right, title or interest in, to or against any of the property of this plaintiff or any of the property of Pickering Lumber Company, and that defendants have no claim or demands against this plaintiff or any of its property, and the defendants are by said decree estopped to claim and enjoined from claiming any right, title or interest in or to the property described in plaintiff's complaint." (Tr. 126-7.)
>
> "By virtue of said confirmation of said plan of reorganization, the provisions of said plan, and said order of confirmation, became binding upon all creditors of Pickering Lumber Company, both secured and unsecured, and whether or not affected by said plan, and whether or not their claims have been filed, and including creditors who had not, as well as those who had, accepted the plan, and in the manner and form aforesaid, if the defendants, as executors of the last will and testament of Robert B. Whiteside owned any interest in the obligation of Pickering Lumber Company to pay the balance of the purchase price for the lands described in plaintiff's complaint, then such right, title or interest has been fully dis-

charged by said plan of reorganization, the confirmation thereof, and said final decree in said proceedings under Section 77B of the Bankruptcy Act. (R. 127.)

"In the manner and form aforesaid, the interest of First & American National Bank of Duluth, as trustee, the interest of all the holders of the notes executed by Robert B. Whiteside, and the interest, if any, of the defendants, as executors of the estate of Robert B. Whiteside, in the obligation of Pickering Lumber Company to pay the balance of the purchase price for the lands described in plaintiff's complaint, have all been fully discharged, and Pickering Lumber Company and this plaintiff have been discharged from said obligation and said obligation no longer exists, and by reason thereof the title which Pickering Lumber Company acquired to the lands described in plaintiff's complaint by the execution of a contract dated January 5, 1927, which title has been acquired by this plaintiff by reason of the provisions of said plan of reorganization and the confirmation thereof, is free of the lien reserved and provided for in said contract dated January 5, 1927, said lien and the obligation thereby secured are fully discharged and satisfied, and defendants have no right, title or interest in said real estate, either by lien or otherwise." (R. 127.)

"Said order (to deliver the deed) constituted a final judgment in said proceedings upon the intervening petition filed by the executors of the last will and testament of Robert B. Whiteside, deceased, in said District Court of the United States for the Western District of Missouri, and from said final judgment no appeal was taken and said judgment was entered in a proceeding to which this plaintiff is a privy as the successor of Pickering Lumber Company and to which Pickering Lumber Company was a party and to which the defendants in this suit and First & American National Bank of Duluth, both individually and as trustee, and said Noteholders' Protective Committee were all parties, and said decree is *res adjudicata* and is binding upon all said parties." (R. 132.)

"If any right, title or interest in the real estate described in plaintiff's complaint remained in Robert B. Whiteside or Sophia Whiteside, his wife, after the execution and delivery of the contract dated January 5, 1927 (which plaintiff denies), then said right, title or interest was conveyed to this plaintiff by the delivery of said deed to this plaintiff by First & American National Bank of Duluth, as trustee, theretofore held in escrow and said delivery was with the consent and at the direction and request of defendants and pursuant to said final decree which was binding upon them and which was rendered by said District Court of the United States for the Western District of Missouri in proceedings which they had instituted in said court and which decree was rendered at their instance and request, and from which they took no appeal and which was *res adjudicata* as to them and as to this plaintiff as privy and successor to Pickering Lumber Company." (R. 135.)

The Superior Court, being the court of first instance, sustained Petitioner's title thus asserted and entered judgment for it but without opinion (R. 157).

B.

In the District Court of Appeal.

The case was heard by the District Court of Appeal on Respondents' appeal thereto and that court, as is heretofore shown (*supra,* p. 16), decided such federal right and title adversely to Petitioner. In its Petition for Rehearing the federal right was specifically claimed and set up as follows:

"1. Because the Court in holding that the bankruptcy court, namely, the District Court of the United States for the Western District of Missouri, did not adjudicate the question here involved, did so in mis-

apprehension of the facts, which misapprehension is shown by the statement of facts in the opinion the court filed on August 27, 1942 (R. 448).

2. Because the court overlooked this respondent's contention that the First and American National Bank, as Trustee, had legal title to the obligation of Pickering Lumber Company to pay the balance of the purchase price for the timber land in question, and as such trustee had the right to accept the Plan of Reorganization of Pickering Lumber Company, and the right to discharge the purchase price obligation by receiving securities issued by Pickering Lumber Corporation, pursuant to such a plan of reorganization, and that the discharge of the purchase price obligation had the same effect as payment thereof; so that such discharge vested the legal title to the lands in question in Pickering Lumber Company's successor, namely, this respondent. (Petition for Rehearing, R. 448.)

3. * * * but the Court overlooked the contention made by respondent that when the purchase price obligation was discharged by the execution of the plan of reorganization and by the delivery of the securities of Pickering Lumber Corporation to the trustee (who had the right to receive whatever was due in composition of the purchase price obligation) then the liability upon the purchase price obligation was fully satisfied and discharged. This discharge had identically the same effect as payment in full. Therefore the discharge of the purchase price obligation automatically vested the title to the real estate in the successor of the Pickering Lumber Company, namely, this respondent. (Petition for Rehearing, R. 453.)

4. The effect of this Court's opinion is that the bankruptcy court had no jurisdiction to deal with the satisfaction, discharge or composition of Pickering Lumber Company's debt represented by the unpaid purchase price obligation, notwithstanding the fact that the trustee and the Whiteside note holders who

had both the legal and beneficial title and interest had filed claims thereon and accepted the plan of reorganization, and the Whiteside executors, who were not entitled to collect the purchase price, had accepted the plan by their prayer that it be carried into effect. If Mr. Whiteside had never assigned the purchase price obligation, but had entered his appearance and asked that the plan be executed, he would have received exactly what his assignee received, namely, the securities in discharge of the debt due from Pickering Lumber Company. (Petition for Rehearing, R. 453.)

5. * * * that this Court, in view of the true facts, determine anew the effect of the orders and judgments of the District Court of the United States for the Western District of Missouri upon the rights of the parties hereto; that this Court consider and determine anew the right of the bankruptcy court to discharge Pickering Lumber Company's obligation to pay the balance of the purchase price for the real estate in question, and the right of First and American National Bank of Duluth, as trustee, to discharge such obligation by the receipt of securities issued by Pickering Lumber Corporation." (Petition for Rehearing, R. 454.)

C.

In the Supreme Court of California.

In Petitioner's Application for Hearing After Final Judgment of a District Court of Appeal filed in the Supreme Court of California the federal questions sought to be reviewed were set up, and the manner in which the same were specifically set up and claimed, were:

"1. The District Court of Appeal, by its opinion rendered in this cause, erroneously denied, ignored and refused to enforce the provisions of Section 77B of the Bankruptcy Act and in that manner denied, ignored and refused to enforce a title and right

claimed and specifically set up by the respondent under said federal statute. The pertinent parts of Section 77B of the Bankruptcy Act which the District Court of Appeal denied, ignored and refused to enforce are as follows (all italics are ours):

Subsection (e)(1) provides that:

'*A plan of reorganization shall not be confirmed until it has been accepted in writing,* whether before or after the filing of the petition or answer under this section, and such acceptance shall have been filed in the proceeding *by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan* * * *.'

Subsection (b) provides that:

'*A plan of reorganization* within the meaning of this section (1) *shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise;* * * * (9) shall provide adequate means for the execution of the plan, which may include the transfer of all or any part of the property of the debtor to another corporation * * * the satisfaction or modification of liens * * * and the issuance of securities of either the debtor or any such corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; (10) *may deal with all or any part of the property of the debtor* and may include any other appropriate provisions not inconsistent with this section * * *. *The term "creditors" shall include,* for all purposes of this section and of the reorganization plan, its acceptance and confirmation, *all holders of claims of whatever character against the debtor or its property,* including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this title. The term "claims" includes debts, securities

other than stock, liens, or other interests of whatever character.'

Subsection (g) provides that:

'*Upon such confirmation the provisions of the plan and of the order of confirmation shall be binding upon* (1) the debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) *all creditors, secured and unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it.*'

Subsection (h) provides that:

'Upon final confirmation of the plan, the debtor and other corporation * * * organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto * * * *and the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the * * * other corporation * * * provided for by the plan * * * shall be free of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved under the order confirming the plan* or directing such transfer and conveyance * * * and the court may direct * * * the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance * * *. Upon the termination of the proceedings a final decree shall be entered * * * closing the case. Such final decree shall discharge the debtor from its debts and liabilities * * * except as provided in the plan or as may be reserved as aforesaid.' (R. 473-475.)

2. In its opinion the Distract Court of Appeal treated the case as though the above-mentioned provisions of Section 77B had never been enacted. It treated the question of the effect of reorganization as though it were a mere question of common law

accord and satisfaction to which defendants had not agreed. The court totally ignored plaintiff's claim that under the provisions of Section 77B of the Bankruptcy Act the acceptance of the plan of reorganization by the bank as trustee and by the Whiteside noteholders was binding upon the whole class of creditors to which defendants belong (R. 475).

3. The District Court of Appeal held that defendants, as executors of the last will of Robert B. Whiteside, retained title to the land in question as security for the payment of the balance due upon the purchase price.

However, the possession of the bankrupt becomes the possession of the bankruptcy court when bankruptcy proceedings are instituted (R. 475-476). * * *

Thereafter, the right of possession and the title may be disputed and adjudicated; but the question as to whether the dispute shall be in the bankruptcy court or in some other court is resolved by the question of whether the bankrupt (or its receiver) was in or out of possession when bankruptcy intervened. Whether Pickering Lumber Company had title was one of the questions which the bankruptcy court, and no other court, had jurisdiction to decide (R. 476-477).

It follows that the bankruptcy court had jurisdiction of the subject-matter, namely, the real estate (R. 477).

4. The District Court of Appeal, ignoring the provisions of Section 77B of the Bankruptcy Act and treating the whole reorganization as a common law proceeding, said:

'Who were the parties to the compromised plan of purported accord and satisfaction? The Whiteside estate was not a party thereto because its acceptance thereof was conditional upon full satisfaction of the Whiteside note obligations, which condition was never complied with.' (R. 478.)

Subsection (e) (1) of Section 77B only requires that a plan of reorganization shall be accepted

'by or on behalf of creditors holding two-thirds in

amount of the claims of each class whose claims have been allowed and would be affected by the plan.'

Subsection (b) of that statute provides that

'* * * the term "creditors" shall include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts * * *. The term "claims" includes debts, securities other than stock, liens, or other interests of whatever character.'

Subsection (g) provides that

'Upon such confirmation (of the plan of reorganization) the provisions of the plan and of the order of confirmation shall be binding upon * * * all creditors, secured and unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, *including creditors who have not, as well as those who have, accepted it.*' (R. 478-479.)

5. The bankruptcy court had jurisdiction *in rem* to determine title to the land, because both possession and beneficial ownership of the land were vested in the bankrupt, and all jurisdictional requirements of Section 77B of the Bankruptcy Act were fully complied with. The District Court of Appeal ignored this point. The District Court of Appeal thus denied a right claimed by plaintiff under a judgment of a federal court made pursuant to a federal statute, which right had been set up in the pleadings and briefs. (R. 492.)

6. The bankruptcy court also had jurisdiction *in personam* because the defendants were in court as interveners at the time the bankruptcy court determined title to the land pursuant to the prayer of their petition in intervention. They were not, as stated in the opinion of the District Court of Appeal, dismissed from court the day before such determination was made. The holding of the District Court of Appeal that the bankruptcy court had no jurisdiction

in personam is based entirely upon the mistaken belief that the bankruptcy court dismissed the petition in intervention (and thus lost jurisdiction of the defendants) *before* it entered the final decree, in which it determined title to the land in accordance with the prayer of that petition; whereas the uncontradicted evidence and the stipulation of the parties is to the effect that the two orders were entered simultaneously. Moreover, even if the petition in intervention had been dismissed before the entry of the final decree, or had never been filed at all, the bankruptcy court still had jurisdiction of the defendants because their attorney appeared at the hearing on the plan of reorganization and in open court expressed approval of the plan. And finally, if the District Court of Appeal had been right in holding that the only adjudication in favor of the executors was that the sale of the purchase price obligation be enjoined, that judgment alone would have made the title *res adjudicata* in this proceeding." (R. 492-493.)

The way in which the federal questions specifically set up and claimed were passed upon by the courts below.

By the Superior Court of Tuolumne County, California.

The Superior Court of Tuolumne County, California, entered judgment for Petitioner, without opinion, but with findings of fact sustaining Petitioner's claims. (R. 151.)

By the District Court of Appeal.

The District Court of Appeal, in dealing with the bankruptcy proceedings of Pickering Lumber Company conducted pursuant to Section 77B of the Bankruptcy Act, stated:

"Who were the parties to the compromise plan or purported accord and satisfaction? The Whiteside estate was not a party thereto because its acceptance thereof was conditional upon full satisfaction of the

Whiteside note obligations, which condition was never complied with. Therefore, the only parties to this compromise, insofar as it affects this case, were the Duluth Bank and Pickering Lumber Company, the bankrupt corporation." (R. 441.)

The opinion states that Petitioner

"did agree to issue and deliver, and did so issue and deliver to Duluth Bank, a creditor of the bankrupt corporation, certain of its stocks and securities, and Duluth Bank did agree to deliver to the reorganized corporation, and did deliver, the deed to the Whiteside tract, which it held in escrow, but was authorized to deliver only upon full payment of the purchase price of the Whiteside tract according to the contract of January 5, 1927." (R. 441-442.)

The opinion states that:

"We believe that the attempt of the bank to pass title to the land it did not own was futile, as was the attempt to separate the mortgage from the mortgage debt." (R. 442.)

Also that:

"The equitable mortgage lien will subsist until the debt it was given to secure (Whiteside notes) is paid in full." (R. 442.)

The opinion states that:

"On March 26, 1937, the petition in intervention was heard and the order of March 17th was reaffirmed, otherwise the court dismissed the intervening petition 'without prejudice' however to the rights of said interveners (Whiteside executors) and respondents (First and American National Bank of Duluth and the members of the Whiteside Noteholders Commit-

tee) with respect to the matters and things alleged in said intervening petition. On March 27, 1937, the bankruptcy court entered its final decree in the reorganization proceedings adjudging, among other things, that the bank deliver the deed it held in escrow, and that 'the securities issued * * * in exchange for said deed, shall be delivered to said First and American Bank of Duluth to be held by said bank in lieu of the collateral represented by said contract dated January 5, 1927, and the payments due thereunder.' " (R. 438.)[1]

The opinion states that:

"There is no doubt that if it (the reorganization court) had acquired jurisdiction over the parties, it had the right to require the contract to be performed; and if and when the contract was performed, to direct the delivery of the deed. It also had a right to direct a foreclosure on the securities held in the security transaction, as the security holder (the bank) had submitted to its jurisdiction; but it had no jurisdiction over the Whiteside executors without bringing them in by proper process, or unless they voluntarily submitted to its jurisdiction." (R. 444.)

The opinion also stated:

"in this case the Whiteside executors came before the bankruptcy court by filing petition in intervention to enjoin the bank from the threatened sale of securities unless it satisfied the claims which it had filed against the Whiteside estate. It is perhaps true that the bankruptcy court might have then tried, determined and adjudicated the issues between the bank and the Whiteside executors as to the right to the

[1]The statement of the court that the intervention was heard on March 26th is in direct contravention of the stipulation of the parties that the order on the intervention and the Final Decree were entered simultaneously March 27, 1937. (R. 180.)

delivery of the deed. If it can fairly be said it did this, the judgment of the bankruptcy court is *res adjudicata* and, although perhaps erroneous, is a bar to defendants in this action; but if, as appears to be the case, the petition was dismissed without prejudice, nothing was adjudicated thereby as against the interveners * * * and they have no right to appeal and are not barred thereby. * * * The question to be determined then is: Did the bankruptcy court adjudicate the question here involved? The order of March 17, 1937, was that the bank should withdraw and discontinue the sale, and 'that the rights of said respondents (the bank and Noteholders Committee) with respect to the matters and things alleged in interveners' petition herein shall not thereby be prejudiced'; that is, the bank, noteholders and Whiteside executors were relegated to the same situation they had occupied before the notice of sale was started, and the court, in said order, reserved 'jurisdiction to hear and determine, insofar as it had jurisdiction to do so, all matters and things set forth in said intervening petition, at the time of the hearing upon the final decree in said reorganization proceedings.' On March 26, 1937, further hearing on interveners' petition was had. The court reaffirmed its former order, insofar as it had ordered withdrawal and discontinuance of the sale by the bank, reciting that 'it appearing to the court that the other controversies involved in said intervening petition are more properly cognizable in the courts of Minnesota.' * * * After this, the final decree was made directing the delivery of the deed in exchange for the securities mentioned but when, as was the case, the interveners' petition was dismissed 'without prejudice,' interveners were no longer before the court. They were not parties. They had filed no claim in the bankruptcy proceedings. They had no right to appeal, and the court had no power to take title to their land away from them. Assuming that the bankruptcy court did have a right to order the bank to deliver the deed, which

> we believe it could not do without having the Whiteside executors as parties to the proceedings, it could not adjudicate their property rights. Therefore, the defendants are not bound by the decree in bankruptcy. * * * Therefore, we determine that the defendants hold title to the Whiteside Tract, subject to an equitable mortgage lien thereon for any unpaid remainder of the Whiteside notes, and also subject to the contract of January 5, 1927; and that the deed of record was delivered without authority and conveys no title to the lands therein described and will not become effective to transfer title until the full contract price is paid according to the terms of said contract of purchase." (R. 444-446.)[1]

The foregoing rulings of the court were of a nature to bring the case within the provisions of Section 237(b) of the Judicial Code, as amended, in that in said decision the District Court of Appeal denied the right, title and interest asserted by Petitioner under Section 77B of the Bankruptcy Act and the bankruptcy proceedings of the Debtor conducted in pursuance thereof that it was vested with title to the lands in question and that Respondents' claims upon the purchase contract had been barred and rejected Petitioner's plea of *res judicata.*

By the Supreme Court of California.

The Supreme Court of California refused to hear the cause and denied Petitioner's application for hearing without rendering any opinion. (R. 455.)

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[1]The court erroneously assumed that at the time the Final Decree was entered an order had been made dismissing in part the intervening petition. According to the stipulation of the parties and the record, it is shown that the Final Decree and order were entered simultaneously on March 27, 1937. (R. 180.) Such dismissal in part did not vacate the permanent injunction procured by the interveners.

V.

Prayer.

Wherefore, it having been shown that this Court has jurisdiction to review the judgment of the court below under subsection (b) of Section 237 of the Judicial Code, as amended, because Petitioner has been denied a right, title, claim, privilege and immunity under subsections (a), (b), (e) and (h) of Section 77B of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 207) specifically set up and claimed by Petitioner and that such federal right also has been denied, because of the rejection of Petitioner's plea that the Plan of Reorganization, as confirmed, and Final Decree were *res judicata* as to Petitioner's title and the barring of Respondents' claims to the real estate, your Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Judges of the District Court of Appeal for the Third Appellate District of the State of California, commanding them to certify and send to this Court the transcript of the record in this case, to the end that the judgment of said court may be reviewed and reversed and that your Petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

PICKERING LUMBER CORPORATION.

By MORRIS E. HARRISON,
PAUL BARNETT,
HENRY N. ESS,
Its Counsel.

State of Missouri, County of Jackson—ss.

PAUL BARNETT, being duly sworn, upon his oath deposes and says:

I am one of counsel for the Petitioner herein. I have read the foregoing petition and know the contents thereof, and the statements of fact contained therein are true to my knowledge. This verification is made by me because the facts of the foregoing petition are within my personal knowledge.

Paul Barnett

PAUL BARNETT

Sworn to and subscribed before me this 28 day of December, 1942.

TRIXIE SMITH,
Notary Public within and for
Jackson County, Missouri.

My commission expires October 6, 1944.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and the case is one in which the prayer of Petitioner should be granted by this Court.

Paul Barnett

PAUL BARNETT,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The Superior Court of Tuolumne County, California, entered judgment for Petitioner (R. 157), but without opinion. The opinion of the District Court of Appeal for the Third District of California was rendered August 29, 1942, and is reported in 54 Advance California Appellate Reports, 290; 128 Pac. (2d) 899; and is set out in the Appendix, pp. 1-16. The order of the Supreme Court of California denying Petitioner's Application for Hearing After Final Judgment of a District Court of Appeal was entered October 26, 1942 (R. 455), without opinion.

II.

JURISDICTION.

Jurisdiction is conferred upon this Court to review the judgment rendered below by writ of certiorari by subsection (b) of Section 237 of the Judicial Code, as amended, Section 1, 43 Stat. 937 (Title 28 U. S. C. A., Section 344).

The court below, the highest court in the State of California in which a decision could be had, has, by its final judgment adjudging Respondents to be the owners of the land in question, denied to Petitioner a right, title, immunity or privilege specifically set up and claimed by it under Section 77B of the Bankruptcy Act of June 7, 1934, c. 424, Section 1, 48 Stat. 912; Act of August 20, 1935, c. 577, 49 Stat. 664; Act of August 29, 1935, c. 809, 49 Stat. 965; Act of August 12, 1937, c. 589, Section 1, 50

Stat. 622 (Title 11 U. S. C. A., Section 207), in that Petitioner was vested with title to said lands by the orders and Final Decree of the bankruptcy court rendered in proceedings for the reorganization of Pickering Lumber Company under said statute. The court below has denied Petitioner's plea of *res judicata* of the orders and Final Decree in the bankruptcy proceedings vesting title in it and barring Respondent's claims, as specifically set up and claimed by Petitioner in this cause, thereby denying to it the right, title, privilege or immunity conferred on Petitioner by said orders and final decree of the bankruptcy court acting under said statute.

The jurisdiction of this Court to review the judgment below by certiorari under Section 237(b) of the Judicial Code, as amended, is sustained by the following decisions of this Court:

Stoll v. *Gottlieb*, 305 U. S. 165, 167;
Davis v. *Aetna Acceptance Corp.*, 293 U. S. 328;
Connell v. *Walker*, 291 U. S. 1;
Danciger & Emerich Oil Co. v. *Smith*, 276 U. S. 542;
Myers v. *International Trust Co.*, 273 U. S. 380;
Jones Nat'l Bank v. *Yates*, 240 U. S. 541;
Harrigan, Trustee, v. *Bergdoll*, 270 U. S. 560;
Nutt v. *Knut*, 200 U. S. 12;
Rankin v. *Barton*, 199 U. S. 228;
Fischer v. *Pauline Oil Co.*, 309 U. S. 294;
Lesser v. *Gray*, 236 U. S. 70;
Seabury, Receiver, v. *Green*, 294 U. S. 165;
Williams v. *Heard*, 140 U. S. 529;
Rector v. *City Deposit Bank*, 200 U. S. 405;
Eauclaire Nat'l Bank v. *Jackman*, 204 U. S. 522;
Motlow v. *State ex rel. Koeln*, 295 U. S. 97, 98;
Pittsburgh, C., C. & St. L. Ry. Co. v. *Long Island Loan & Trust Co.*, 172 U. S. 493, 507;
Des Moines Nav. Co. v. *Iowa Homestead Co.*, 123 U. S. 552.

III.

STATEMENT OF THE CASE.

The statement of the case is set forth in the Petition for Certiorari, pp. 6-16, under the heading "Summary and Short Statement of the Matters Involved," to which reference is hereby made.

IV.

SPECIFICATION OF ERRORS.

1. The court below erred in holding that Petitioner's title to the lands was not vested and that Respondents' claims thereto were not barred by the Plan of Reorganization, as confirmed, and the Final Decree rendered by the Bankruptcy Court in proceedings for the reorganization of Pickering Lumber Company conducted under Section 77B of the Bankruptcy Act.

2. The court below erred in adjudging that Respondents were vested with the title to the real estate because Petitioner's title thereto became vested in it pursuant to the Plan of Reorganization as confirmed, and the Final Decree in the bankruptcy proceedings to which Respondents were bound.

3. The court below erred in not adjudging that the Plan of Reorganization, as confirmed, and the Final Decree in the bankruptcy proceedings were *res judicata* as to Petitioner's title to said real estate.

4. The court below erred in holding that Respondents, who had received notice of the bankruptcy proceedings, had participated therein and had invoked the jurisdiction of that court by intervention to compel execution of the Plan of Reorganization, were not parties to the proceedings and were not bound thereby.

5. The court below erred in holding that the bankruptcy court did not have jurisdiction to order the Duluth Bank, which was a party to the proceedings, to deliver the deed held by it in escrow.

6. The court below erred in holding, contrary to the record and the stipulated facts, that the Final Decree and the order dismissing Respondents' intervention were not entered simultaneously.

7. The court below erred in holding that the bankruptcy court had no jurisdiction to deal with the real estate which, under the undisputed facts, was in possession of the bankruptcy court at the commencement of the proceedings and when the Final Decree was entered and when all claimants to the real estate, including Respondents, were parties to the bankruptcy proceedings and made no challenge or objection to the jurisdiction of the bankruptcy court, the Plan of Reorganization or Final Decree and took no appeal therefrom.

8. The court below erred in holding that Respondents' relation as parties to the bankruptcy proceedings terminated with the dismissal in part of the intervening petition and that Respondents were not bound by the Order Confirming the Plan of Reorganization entered prior to such dismissal and by the Final Decree entered simultaneously with such dismissal.

V.

SUMMARY OF THE ARGUMENT.

A.

The bankruptcy court had jurisdiction to determine title to the real estate and to bar Respondents' claims thereto.

1. The Bankruptcy Court had Jurisdiction of the Parties (pp. 49-54).

2. The Bankruptcy Court had Jurisdiction to Determine Whether the Plan of Reorganization had Been Accepted by or on Behalf of Creditors Holding Two-Thirds in Amount of the Claims of Each Class Whose Claims had Been Allowed (pp. 54-56).

3. The Bankruptcy Court had Jurisdiction to Adjudicate the Title to the Real Estate (pp. 56-59).

4. The Provisions of the Order Confirming the Plan of Reorganization and in the Final Decree Barring all Creditors and Stockholders Who Had and Who Had Not Filed Their Claims, Except as Provided in the Plan of Reorganization, Were Manifestly Within the Power of the Bankruptcy Court (pp. 59-61).

B.

The order confirming the plan of reorganization and the final decree of the bankruptcy court whereby petitioner was vested with title and Respondents' claims were barred, were *res judicata* as to respondents (pp. 39-67).

VI.

ARGUMENT.

A.

The bankruptcy court had jurisdiction to determine title to the real estate and to bar Respondents' claims thereto.

1. The Bankruptcy Court had Jurisdiction of the Parties.

It was admitted by stipulation that the bankruptcy court gave notice to all creditors of all proceedings conducted therein (R. 173, 174, 176). It is also admitted that Respondents appeared at the hearing upon the fairness and feasibility of the Plan of Reorganization and in open court expressed approval thereof (R. 175). With no limitation on their appearance Respondents filed an intervening petition in aid of the execution of the Plan (R. 179). At no time in the bankruptcy proceedings did they

challenge the power of the bankruptcy court to approve and execute the Plan of Reorganization, which they knew expressly provided for the transfer of title to the lands to Petitioner in consideration of Petitioner delivering the securities prescribed by the Plan to the Duluth Bank and the Noteholders' Protective Committee, as assignees of the entire unpaid balance on the purchase contract, in satisfaction of such balance (R. 64).

Such appearances in the bankruptcy court by Respondents at the hearing on the feasibility and fairness of the Plan and their intervention to invoke the jurisdiction of the court in aid of the execution of the Plan subjected them to the jurisdiction of that court. In *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, there was no such extended participation in the proceedings by the creditor there involved as there was by Respondents, yet this Court treated the creditor in that case as being a party to the proceedings because it had notice thereof and therefore had opportunity to assert its claims.

By their intervention, Respondents became parties to the proceedings for all purposes.

> *Alexander* v. *Hillman,* 296 U. S. 222, 241;
> *French* v. *Gapen,* 105 U. S. 509, 525;
> *Commercial Electrical Supply Co.* v. *Curtis,* 288 F. 657 (C. C. A. 8);
> *Swift* v. *Black Panther Oil & Gas Co.,* 244 F. 20, 29 (C. C. A. 8);
> *Rice et al.* v. *Durham Water Co.,* 91 F. 433, 434 (C. C. North Car.).

By their intervention Respondents recognized the validity of all orders which were made before the filing of the intervention.

U. S. v. *California Cooperative Canneries,* 279 U. S. 553, 556;
King v. *Barr,* 262 F. 56 (C. C. A. 9).

Inasmuch as Respondents did not question the jurisdiction of the bankruptcy court and did not in any way limit their appearance, their intervention had the effect of making binding on them all orders and judgments of the bankruptcy court entered before and after their intervention.

Bethke v. *Grayberg Oil Co.,* 89 F. (2d) 536 (C. C. A. 5);
Schwartz v. *Randolph,* 72 F. (2d) 892 (C. C. A. 4);
Rector v. *U. S.,* 20 F. (2d) 845 (C. C. A. 8);
Commercial Electrical Supply Co. v. *Curtis,* 288 F. 657, 659 (C. C. A. 8);
Phipps v. *Chicago, etc. Ry. Co.,* 284 F. 945, 955 (C. C. A. 8);
Swift v. *Black Panther Oil & Gas Co.,* 244 F. 20, 28 (C. C. A. 8);
First National Bank of Houston v. *Ewing,* 103 F. 168 (C. C. A. 5);
Frank v. *Wedderin,* 68 F. 818, 822 (C. C. A. 5).

Probably to avoid these principles the court below erroneously held that the order of the bankruptcy court confirming its temporary restraining order enjoining the Duluth Bank from selling the unpaid purchase contract, and in dismissing the intervening petition, divested the bankruptcy court of jurisdiction over Respondents (R. 445-446). It mistakenly stated in its opinion that the order dismissing the intervening petition was entered March 26, 1937, (R. 445) and the Final Decree was entered "after this" (R. 446). This holding is erroneous in factual basis

because it appears by the stipulation of the parties (R. 179-180) and by the record (Ex. 25, R. 332; Ex. 26, R. 333) that the order dismissing the intervention and the entry of the Final Decree were made simultaneously on March 27, 1937.

This Court is not bound by the erroneous finding thus made by the court below. On certiorari to the highest court of a state this Court has held that it will re-examine the facts as disclosed by the record because, when a federal right has been specifically set up and claimed in a state court, this Court will ascertain from the record not only whether such right was denied in express terms, but also whether it was denied in substance and effect. If such determination requires an examination of the evidence, then, under the rulings of this Court, such an examination will be made.

Norris v. *Alabama,* 294 U. S. 587, 590;
Drivers Union v. *Meadowmoor Co.,* 312 U. S. 287, 299;
Pierre v. *Louisiana,* 306 U. S. 354, 358;
Chambers v. *Florida,* 309 U. S. 227, 228;
Smith v. *Texas,* 311 U. S. 128, 130;
Chicago, G. W. R. Co. v. *Rambeau,* 298 U. S. 99, 101;
C. & O. R. Co. v. *Stapleton,* 279 U. S. 587, 590.

Examination of the record (R. 180) by this Court will disclose that the finding by the court below that the order dismissing the intervention was made prior to the entry of the Final Decree and not simultaneously with it contravenes both the stipulation and the record and requires a conclusion by this Court that the order dismissing the intervention and the entry of the Final Decree were made simultaneously.

Respondents were thus parties when the Final Decree was rendered and the ruling of the court below that Respondents had not entered their general appearance and were not parties is clearly erroneous. No decision can be found to support the ruling of the court below that a party who has once entered a general appearance in bankruptcy proceedings, without reservation or challenge to the bankruptcy court's jurisdiction, may withdraw and thereupon terminate that court's authority to adjudicate rights with which he is directly concerned. If a party may enter his appearance and withdraw when he desires, then an adjudication unfavorable to him would be impossible. Respondents reserved no such privilege and the law accords none to them. Therefore, either under the admitted facts or under the erroneous factual basis of the court below, Respondents were parties to the bankruptcy proceedings when the Final Decree was rendered.

Even were the case before the court on a direct appeal from the decree, Respondents would be held to have waived any right they might seasonably have asserted that the bankruptcy court did not have personal jurisdiction over them to summarily adjudicate title in the bankruptcy proceedings. Assuming that Respondents had a substantially adverse claim to the real estate and that they could have insisted that such claim be determined in a plenary suit, they nevertheless would be deemed to have waived such privilege because of their general appearance and their failure seasonably to have asserted such right in the bankruptcy court.

McDonald v. *Plymouth Trust Co.*, 286 U. S. 263;
Harris v. *Avery Brundage Co.*, 305 U. S. 160.

Respondents expressed approval of the Plan in open court and by intervention they sought the aid of the

bankruptcy court to execute the Plan. They made no insistence that the court could not proceed against them except by plenary suit. Therefore their general appearance and conduct was tantamount to consent that the bankruptcy court adjudicate all claims as it did and, as a consequence, even on direct appeal Respondents would be deemed to have waived any right to assert that the bankruptcy court did not have jurisdiction over them.

Jurisdiction over Respondents was a judicial fact which the bankruptcy court necessarily determined as a prerequisite to exercising jurisdiction to adjudicate the title. Manifestly, in a collateral proceeding this judicial determination is not subject to challenge.

Chicot County Drainage Dist. v. *Baxter State Bank*, 308 U. S. 371;
Stoll v. *Gottlieb*, 305 U. S. 165.

2. The Bankruptcy Court had Jurisdiction to Determine Whether the Plan of Reorganization had Been Accepted by or on Behalf of Creditors Holding Two-Thirds in Amount of the Claims of Each Class Whose Claims had Been Allowed.

The Duluth Bank and the Noteholders' Protective Committee, as the holders of $300,000 principal amount of Whiteside notes, filed claims for the entire unpaid balance of $300,000 under the purchase contract (R. 171-174). Such claims were based upon the instruments of assignment executed by Whiteside wherein he assigned the entire unpaid balance of the purchase contract to the Duluth Bank in its capacity as trustee (R. 170). These claims of the Bank and the Noteholders' Protective Committee for the entire unpaid balance of the purchase contract were allowed by the bankruptcy court (R. 177) and were specifically classified by the court (R. 223) and the Plan made provision for their satisfaction (R. 64). The allowance of those claims necessarily involved de-

termination by the bankruptcy court of the legal effect of the execution of the assignments to the Duluth Bank. That court adjudicated that Whiteside had assigned the unpaid balance of the purchase contract and such assignment had clothed the Duluth Bank with plenary authority to collect the entire unpaid balance of the purchase price and to exercise such rights as Whiteside could have exercised had the assignment not been executed. It follows that the Duluth Bank, as assignee of the unpaid balance, was the proper party not only to prove the claim but to file written acceptance of the provision of the Plan dealing with the unpaid purchase price.

It has been held by this Court that an assignee of a creditor of a bankrupt possesses all of the rights which the assignor had, and may file claims therefor against the bankrupt.

Shropshire, Woodliff & Co. v. *Bush*, 204 U. S. 186.

It has been held that the holder of the claim is the proper party to prove a claim in bankruptcy proceedings.

Warburton v. *Trust Co. of America*, 182 F. 769 (C. C. A. 3), 169 F. 974;
In re Dunlap Carpet Co., 206 F. 726 (D. C. Pa.);
Assets Realization Co. v. *Sovereign Bank of Canada*, 210 F. 156 (C. C. A. 3).

Under subparagraph (e)(1) of Section 77B of the Bankruptcy Act it is provided that:

> "A plan of reorganization shall not be confirmed until it has been accepted in writing * * * by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan."

It is for the bankruptcy court to determine whether acceptance in writing has been given "by or on behalf

of" creditors holding two-thirds in amount of the claims of each class. It has been held by the lower federal courts that assignees of creditors may participate in the plan of reorganization.

> *Texas Hotel Securities Corp.* v. *Waco Development Co.*, 87 F. (2d) 395 (C. C. A. 5);
> *In re Pressed Steel Car Co.*, 16 F. Supp. 329 (D. C. Del.);
> *In re Indiana Central Tel. Co.*, 24 F. Supp. 342 (D. C. Ind.).

As such assignees the Duluth Bank and Noteholders' Protective Committee had the right to accept the Plan of Reorganization making provision for the satisfaction of the unpaid balance on the purchase contract in consideration of delivery of title to the lands to Petitioner and the adjudication of the court that the Plan of Reorganization was accepted was clearly within its jurisdiction under subparagraph (e)(1) of Section 77B.

3. The Bankruptcy Court had Jurisdiction to Adjudicate the Title to the Real Estate.

It is admitted that the real estate was in the possession of the Debtor at the commencement of the reorganization proceedings and when the Final Decree was entered by the bankruptcy court (petition, R. 2, cross-complaint, R. 9). Respondents, the Duluth Bank, as assignee, in its capacity as an owner of some of the Whiteside notes, and as trustee, the Noteholders' Protective Committee, as *cestui trustent,* and Debtor constituted the entire class of persons who could have asserted any claim to the real estate. Therefore the bankruptcy court had jurisdiction to deal with the real estate because of its possession by the Debtor and jurisdiction to bind the claimants to the

real estate who were parties to the bankruptcy proceedings.

Under subsection (a) of Section 77B of the Bankruptcy Act the bankruptcy court has exclusive jurisdiction of the Debtor and its property, wherever located, and may

> "exercise all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature."

In *Thompson* v. *Magnolia Co.*, 309 U. S. 478, this Court held that a bankruptcy court, acting under Section 77 of the Bankruptcy Act dealing with the reorganization of railroads, had summary jurisdiction to deal with controversies relating to property in the actual possession of the bankruptcy court and that the test of the jurisdiction is not title, but possession by the bankrupt at the time of the filing of the petition in bankruptcy. This Court said (l. c. 481):

> "Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession and the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy. Here the trustee succeeded to the physical possession, custody and control of the right of way lands which the railroad had enjoyed at the time of the bankruptcy."

Also, in *Ex Parte Baldwin*, 291 U. S. 610, again dealing with Section 77 of the Bankruptcy Act, this Court held that (l. c. 616):

> "The jurisdiction extends also to the adjudication of questions respecting the title. *White* v. *Schloerb*, 178 U. S. 542; *In re Eppstein*, 156 Fed. 42."

The bankruptcy court, as a prerequisite to exercising jurisdiction to adjudicate title, must determine whether the property is in the possession of the court. This jurisdictional fact stands admitted and therefore it must be conceded that the court had jurisdiction to determine this question.

> *Harris* v. *Avery Brundage Co.*, 305 U. S. 160;
> *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 738;
> *Taubel, etc.*, v. *Fox*, 264 U. S. 426;
> *Chicago Board of Trade* v. *Johnson*, 264 U. S. 1;
> *Herbert* v. *Crawford*, 228 U. S. 304;
> *Murphy* v. *John Hofman Co.*, 211 U. S. 562;
> *Whitney* v. *Wenman*, 198 U. S. 539.

Under subparagraph (h) of Section 77B of the Bankruptcy Act it is provided that upon confirmation of the plan the debtor or other corporation or corporations organized or to be organized shall have full power and authority to carry out the plan and the orders of the judge relative thereto, and

> "the property dealt with by the plan, when transferred and conveyed by the trustee * * * to the debtor or the other corporation or corporations * * * shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan * * *."

The Plan of Reorganization provided that in consideration of the delivery of securities Petitioner was to be

vested with the title to the real estate (R. 64). To accomplish this the Final Decree provided that the Duluth Bank, as escrowee of the deed executed by Whiteside conveying the real estate to Debtor, should deliver the deed to Petitioner (R. 331) and that Petitioner would be possessed of all of the property of every kind and character of Debtor (R. 331).

Inasmuch as the Duluth Bank was admittedly a party to the proceedings, the court had inherent power to compel it to make delivery of the deed in consideration of satisfaction being made of the entire unpaid balance of the purchase price under the purchase contract as provided in the Plan of Reorganization. Such plenary authority was conferred by subparagraph (h).

The property being in the possession of the Debtor when the petition was filed and the Final Decree entered, the bankruptcy court having summary jurisdiction under the Act to deal with all controversies respecting the real estate and all persons having any claims thereto being parties to the bankruptcy proceedings and making no challenge to the jurisdiction of the court, there can be no doubt that the adjudication of title by the bankruptcy court would be free from challenge even on direct appeal, and in a proceeding where the adjudication is collaterally attacked, there certainly can be no doubt that the bankruptcy court's determination of jurisdiction is free from attack.

4. The Provisions in the Order Confirming the Plan of Reorganization and in the Final Decree Barring all Creditors and Stockholders Who Had and Who Had Not Filed Their Claims, Except as Provided in the Plan of Reorganization, Were Manifestly Within the Power of the Bankruptcy Court.

The Order Confirming the Plan of Reorganization (R. 177) and the Final Decree (R. 179, Ex. 25, R. 237) pro-

vided that the claims of all creditors and stockholders, both those who had and who had not filed their claims, were barred from thereafter asserting any claim against the Debtor or its property (R. 330). It was within the power of the court under subparagraph (b) (9) of the statute to provide that the delivery of securities by Petitioner would be in full satisfaction of all claims under the purchase contract. It is provided under subparagraph (h) that when the property is transferred and conveyed, as required by the plan, to the debtor or a corporation to be organized, that such property

> "shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan."

Examination of the Plan and the confirming order discloses that no reservations were made, and consequently under this provision of the statute the court was vested with authority to bar Respondents' claims.

Likewise there can be no doubt as to the authority of the court to have entered the Final Decree barring the claims of Respondents. The Final Decree made express provision barring all such claims (R. 330). The effect of the Final Decree, wholly independent of any such provision, is stated by subsection (h) of the statute to be that

> "such final decree shall discharge the debtor from its debts and liabilities and shall terminate and end all rights and interests of its stockholders except as provided in the plan or as may be reserved as aforesaid."

The reservation "as aforesaid" deals with the reservation in the plan, and, there being no reservation in the Plan of Reorganization for Respondents, their claims

were properly barred by the Order Confirming the Plan of Reorganization and by the Final Decree.

B.

The order confirming the plan of reorganization and the final decree of the bankruptcy court whereby petitioner was vested with title and Respondents' claims were barred, were *res judicata* as to respondents.

The defense of *res judicata* of the order of confirmation and Final Decree specifically set up and claimed by Petitioner (R. 117, 118, 123-135) was denied effect by the court below (R. 447). Respondents had opportunity seasonably to contest the jurisdiction of the bankruptcy court or to challenge its adjudication by appeal. It is obvious that Respondents' claims to the real estate should have been addressed to the bankruptcy court. Instead, Respondents asserted no claims therein, but, by this suit, seek to have litigated issues which they knew were being adjudicated in the bankruptcy court. Furthermore, they urged that the bankruptcy court make the adjudication which they successfully challenged in the court below.

The following elements sustaining the defense of *res judicata* are established.

1. The real estate being in the possession of the Debtor, and Respondents and all of the other claimants to the real estate being parties to the bankruptcy proceedings, the bankruptcy court was authorized to adjudicate all controversies, as to title.

2. The Plan of Reorganization expressly dealt with the entire unpaid balance under the purchase contract (R. 64) and the provision therein made for the satisfaction of the claims thereunder was executed (R. 181) all of which Respondents had knowledge before the termination of the

bankruptcy proceedings so that they might have filed claims or objected seasonably.

3. By their personal appearance in the bankruptcy proceedings, the filing of their intervention, and because of notices given to them as required by the statute, Respondents were parties to the proceedings and had full opportunity therein seasonably to assert their objections to the Plan, the jurisdiction of the court and their claims to the real estate.

4. Although they were informed in time, Respondents asserted no objections to the provisions of the Plan dealing with the satisfaction of the claims under the purchase contract for the entire unpaid balance, the vesting of title to the lands in Petitioner or the jurisdiction of the bankruptcy court to make such determination.

5. The court had jurisdiction over the Duluth Bank which was a party to the proceedings and, in execution of the Plan, properly required delivery by it of the escrowed deed.

Respondents, having had the opportunity to assert their rights in the bankruptcy proceedings, cannot avoid the effect of the adjudication by remaining silent and then seek establishment of their claims in a subsequent suit. Fully supporting this contention is *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, where this Court was dealing with a similar contention as to the effect of a final decree of a federal district court rendered in proceedings to effect a Plan of Readjustment of the indebtedness of a drainage district under the Act of May 24, 1934, providing for "Municipal Debt Adjustment" (48 Stat. 798). The Chicot County Drainage District had effected a Plan of Readjustment under the Act. The court's decree recited that the plan had been accepted

by more than two-thirds of the outstanding indebtedness, was fair and equitable and made provision for the satisfaction of the obligations of the bonds affected by the Plan. The decree provided that unless the old bonds were deposited in court within one year they should be barred from participating in the Plan of Readjustment; the old bonds were canceled and the holders thereof were enjoined from asserting any claim thereon.

After the termination of the adjustment proceedings the bondholders instituted an action to recover on fourteen of the original bonds issued by the Drainage District and held by it. The Drainage District's claim that the final decree in the readjustment proceedings was *res judicata* was rejected by the Court of Appeals and this Court granted certiorari. The bondholders contended that the decree of the bankruptcy court was void because this Court, in a subsequent case, had held the Municipal Adjustment Act unconstitutional.

The evidence disclosed that the bondholder had notice of the proceeding, and this Court treated it as a party. However, the bondholder did not challenge the constitutionality of the statute under which the court was acting, it filed no claim in the proceedings, asserted no objection and took no appeal. This Court said (l. c. 375):

> "As parties, these bondholders had full opportunity to present any objections to the proceeding, not only as to its regularity or the fairness of the proposed plan of readjustment or the propriety of the terms of the decree, but also as to the validity of the statute under which the proceeding was brought and the plan put into effect. Apparently no question of validity was raised and the cause proceeded to decree on the assumption by all parties and the court itself that the statute was valid. There was no attempt to review the decree. If the general principles governing

> the defense of *res judicata* are applicable these bondholders, having the opportunity to raise the question of validity were not the less bound by the decree because they failed to raise it."

Certainly the case at bar is much stronger than *Chicot County Drainage District* v. *Bank, supra,* because, in that case the basic authority of the court to act had been held unconstitutional and void.

All questions as to the authority of the bankruptcy court and the verity of its judgment on matters of law could have been seasonably asserted in that court by Respondents and if rejected by the bankruptcy court Respondents could have challenged the judgment on appeal, but Respondents wholly failed to make any claim, to enter objections or to take an appeal. Quite to the contrary, they expressed in open court their satisfaction with the Plan of Reorganization and by their intervention invoked the jurisdiction of the district court to bring about the execution of the plan. Having failed to raise the question in the bankruptcy proceedings to which they were parties, Respondents cannot relitigate those claims in this case. Respondents are bound by the bankruptcy proceedings because they failed to assert their claims after having opportunity to do so. This contention is sustained by the decision of this Court in *Chicot County Drainage District* v. *Bank, supra,* where this Court said (l. c. 378):

> "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar not only as respects matters actually presented

> to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' "

That the denial of Petitioner's defense of *res judicata* was clearly erroneous is sustained by the ruling of this Court in *Stoll* v. *Gottlieb,* 305 U. S. 165. There the petitioner, who was a stockholder in a corporation which was reorganized under Section 77B, had guaranteed the payment of bonds executed by the corporation. The plan of reorganization discharged the liability of petitioner on the guaranty. Respondent, as the holder of one of the bonds, moved to vacate confirmation of the plan, but, upon denial of that motion, he took no appeal. Instead, he instituted suit against petitioner in a municipal court of Chicago to recover on the guaranty. Petitioner's claim of *res judicata* was rejected by the state court and this Court granted certiorari. This Court held that the claim in the reorganization proceedings was *res judicata* and, as the contention was that the ruling below disregarded a decree of a court of the United States, a federal question was raised reviewable under Section 237(b) of the Judicial Code, as amended. This Court held that even if no affirmative conclusion as to jurisdiction had been made, such judgment may not be assailed collaterally. This Court said (l. c. 172):

> "After a party has his day in court with opportunity to present his evidence and his view of the law a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined."

The bankruptcy court was authorized to determine any claims Respondents may have had to the real estate. In

fact, jurisdiction to make such determination was exclusively in that court under subparagraphs (a) and (o) of the statute. Having had the opportunity to litigate those claims in the bankruptcy court, Respondents are none the less bound because they did not choose to file any claim. This proposition is sustained by *Jackson* v. *Irving Trust Company,* 311 U. S. 494, 503, where this Court said:

> "However the issues were labeled the court was authorized to determine them. *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266, 274; *Stoll* v. *Gottlieb, supra,* p. 171. And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree. *Cromwell* v. *County of Sac,* 94 U. S. 351, 352; *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 479; *Chicot County Drainage District* v. *Baxter State Bank, supra; Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 403. If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken."

These authorities establish that the bankruptcy court's adjudication of title was within its jurisdiction and is final and inasmuch as Respondents had full opportunity to have their claims determined in the bankruptcy proceedings they are nevertheless bound by the confirming order and Final Decree in those proceedings because they did not avail themselves of that opportunity by seasonably asserting their claims in the bankruptcy proceedings. Under the circumstances the rejection of Petitioner's plea of *res judicata* constitutes a denial of a right, title, privilege and immunity conferred by the bankruptcy pro-

ceedings conducted pursuant to the statute and therefore this Court has jurisdiction to review the judgment under Section 237(b) of the Judicial Code, as amended.

Conclusion.

Petitioner's title to the real estate was vested in it by the Plan of Reorganization and Final Decree entered in bankruptcy proceedings conducted under Section 77B of the Bankruptcy Act of June 7, 1934, c. 424, Section 1, 48 Stat. 912; Act of August 20, 1935, c. 577, 49 Stat. 664; Act of August 29, 1935, c. 809, 49 Stat. 965; Act of August 12, 1937, c. 589, Section 1, 50 Stat. 622 (Title 11 U. S. C. A., Section 207), and as the court below denied such title, Petitioner has been denied a right, title, privilege or immunity conferred by said federal statute. The Plan of Reorganization, as confirmed, and the Final Decree, as entered, by the bankruptcy court in such proceedings are *res judicata* as to every claim of Respondents and the denial of Respondents' plea of *res judicata* by the court below denied to Petitioner a right, title, privilege and immunity adjudged to Petitioner by said bankruptcy court acting under Section 77B.

Inasmuch as the rights of Petitioner under the federal statute and the bankruptcy court were specifically set up and claimed in the courts below, such rights and claims are substantial and were denied by the court below, this Court has jurisdiction under Section 237(b) of the Judicial Code, as amended, to grant a writ of certiorari to review such judgment. It is respectfully prayed that this Court

grant the writ of certiorari to review the judgment rendered by the court below.

Respectfully submitted,

MORRIS E. HARRISON,
PAUL BARNETT,
HENRY N. ESS,
Counsel for Petitioner.

APPENDIX.

I.

Opinion of the District Court of Appeal for the Third Appellate District of the State of California:

"(Civ. No. 6705. Third Dist. Aug. 29, 1942.)

PICKERING LUMBER CORPORATION (a Corporation), Respondent, v. Sophia Whiteside et al., Appellants.

APPEAL from a judgment of the Superior Court of Tuolumne County. J. T. B. Warne, Judge. Reversed with directions.

Action to quiet title to land. Judgment for plaintiff reversed with directions.

Wm. M. Abbott, Cyril Appel, Ivores R. Dains and F. H. De Groat for Appellants.

Rowan Hardin, Paul Barnett and Watson, Ess, Groner, Barnett & Whittaker for Respondent.

ALLEN, J. pro tem.—This is an action to quiet title to a large tract of timber land situated in Tuolumne and Calaveras Counties. The appeal was taken by defendants from a judgment in favor of plaintiff. The various transactions bearing on the problem involved are evidenced by many instruments and records of judicial proceedings. For the purpose of clarity it may be well to set out the matter in controversy before examining the facts and pleadings. The transcript contains a lengthy stipulation of facts. Briefly stated, the problem is this: Plaintiff's predecessor in interest, Pickering Lumber Company, entered into a written contract with Robert B. Whiteside and Sophia Whiteside, his wife, in which said Pickering Lumber Company agreed to pay a stipulated consideration for said tract of land, all of which consideration has been satisfactorily paid, except

the sum of $300,000 and interest thereon. Plaintiff contends that this $300,000 obligation and interest thereon was extinguished by an accord and satisfaction consummated by the duly authorized representatives of the parties to the contract, and that, in pursuance thereof the United States District Court in Bankruptcy, at Kansas City, Missouri, having jurisdiction of the subject-matter and the parties, approved such accord and satisfaction, and by its final judgment and order directed the delivery of the deed, in evidence of the title which had passed; and that this judgment is a bar to defendants' assertion of any claim to title or interest in the lands.

The essential facts are as follows: Robert B. Whiteside was the owner, subject to a mortgage to the Detroit Trust Company, of this large tract of timber land. On January 5, 1927, he contracted for the sale thereof for $1,804,400 to the Pickering Lumber Company. The price was to be paid, $404,400 cash on execution of the contract, $600,000 by assuming and agreeing to pay the outstanding mortgage, and $800,000 payable in four annual installments of $200,000 each on January 5th of the years 1929 and 1932, inclusive. The Pickering Lumber Company was to have immediate possession, the deed to be placed in escrow with First National Bank of Duluth, Minnesota, for delivery to the purchaser upon payment of the entire purchase price, payments to be made to said bank to and for the account of Whiteside.

On January 5, 1928, Whiteside executed to the First National Bank of Duluth a so-called 'collateral trust agreement' to secure an issue of $400,000 of his notes. Thereby Whiteside 'sold, assigned, transferred, pledged and set over' to said bank all rights to the installments due under his contract with Pickering Lumber Company on January 5, 1930, and January 5, 1931 (aggregating $400,000), with interest thereon, in trust for the security of the holders of the notes. He also transferred all rights under the contract 'insofar as the same may be necessary or applicable to en-

forcing payment of said amounts from said Pickering Lumber Company.' Payments by the said company subsequently reduced the amount due under this agreement to $100,000, the time of payment of which was extended to January 5, 1934.

On July 5, 1928, there was a similar agreement with said bank to secure another issue of Whiteside notes, this time $200,000 in amount. The terms were similar, and the installment of $200,000 due January 5, 1932, under the Pickering contract was assigned as security. The First National Bank of Duluth and American Exchange National Bank of Duluth consolidated under the name of First and American National Bank of Duluth, which succeeded to all the rights, duties and obligations of the First National Bank of Duluth.

Throughout the determinative period, $100,000 of the installment originally due January 5, 1930, and the whole of the $200,000 due January 5, 1932, and interest thereon, assigned to the bank as security for the Whiteside notes, have remained unpaid. Everything else owing by the Pickering Lumber Company to Whiteside has been paid, except this part of the said installments so assigned to the bank.

On September 19, 1931, Whiteside died. His estate is in process of administration in the probate court of St. Louis County, Minnesota, with ancillary administration pending in the probate court of the State of California, in and for the city and county of San Francisco, the defendants being executors under the will of deceased in both courts. The bank's claim on the Whiteside first notes and first trust agreements owned by it was allowed by the Minnesota probate court for $106,986.30, and also the bank's claim as trustee under the second trust agreement in the sum of $212,000. Under the Minnesota law these amounts became judgments against the Whiteside estate.

In May, 1931, a receiver was appointed for the Pickering Lumber Company, by the United States District Court in Missouri. In November, 1934, the company filed therein a petition for reorganization

under section 77-B of the Bankruptcy Act, 11 U. S. C. A. section 207.

In 1931, after the death of Whiteside, and while Pickering Lumber Company was having financial difficulty, a Whiteside Noteholders' Protective Committee was formed. In 1936 there were negotiations between that committee and the bank, a Pickering Bondholders' Committee which had been formed, and the voluntary committee for reorganization of Pickering Lumber Company, touching the treatment in the plan of organization of the company's indebtedness under the Whiteside contract.

The bank filed three claims against the bankrupt, either on the 'Whiteside notes' or the security held thereunder on Pickering Lumber Company's obligation to pay the installments on the Whiteside contract, depending on the construction of the language in the claims. One of these was on the $100,000 obligation 'as trustee,' reserving its right to the security; another was on this $100,000 obligation 'as owner,' with the same reservation; the other was on the $200,000 obligation 'as trustee,' with same reservation. The noteholders' committee filed a claim on the $200,000 obligation, 'on behalf of owners,' with same reservation. The claims of bank as owner, and of noteholders' committee 'on behalf of owners' were allowed, and the other two claims were disallowed.

In May, the Whiteside noteholders made a written proposal, 'to release the above mentioned claim against the Pickering Lumber Company and deliver to the reorganized Pickering Lumber Company the deed in our possession,' and receive in return therefor $105,000 of 4 per cent income bonds, $195,000 of 5 per cent non-cumulative preferred stock, and 3,000 shares of common stock of the reorganized Pickering Lumber Company. (The deed should have been in possession of the bank, as escrow-holder, and not the noteholders.) However, it was stated in the proposal that it would be necessary for the representatives of Whiteside's estate to procure approval of the probate court of St. Louis County, Minnesota,

of the plan of reorganization. Mr. De Groat, as attorney for the executor, signed a letter consenting to the plan of reorganization and to the proposal, 'subject to the approval of the probate court. * * *'

On February 19, 1937, the federal court entered an order of approval of the plan of reorganization, accepting the proposal in regard to the Pickering-Whiteside note obligations. On February 17, 1937, the Minnesota probate court made an order authorizing the executors to consent to the plan for exchange of securities of the reorganized Pickering Lumber Company in return for the deed, and authorizing them to direct the bank to deliver the deed held in escrow on condition that the claims on Whiteside's notes which were judgments against the estate, would be satisfied and discharged.

The bank, holding as trustee, apparently believing it had no legal right to waive a possible deficiency judgment on the Whiteside notes, commenced foreclosure proceedings on the securities it held, and advertised the same for sale. The Minnesota executors of the Whiteside estate then filed a petition in intervention in the bankruptcy court. It set out the probate court order, and asked that the bank be directed to satisfy its claim against Whiteside's estate; that the bank be directed to deliver the deed held in escrow, and that the Whiteside noteholders be directed to deliver the Whiteside notes to Pickering Lumber Company upon the issuance of the stock and bonds of the reorganized company; that the court enjoin foreclosure sale by the bank until after hearing; that the bank be directed generally to do all things necessary to carry out the proposed plan of reorganization; and that the court enter an order upon respondents to show cause why the directions and orders prayed for should not be granted. The sale was ordered withdrawn, and the matter set for hearing.

On March 17, 1937, the bankruptcy court entered an order directing the bank to withdraw the sale

without prejudice to respondents' rights. On March 26, 1937, the petition in intervention was heard, and the order of March 17th was reaffirmed. Otherwise the court dismissed the intervening petition 'without prejudice, however, to the rights of the said interveners (Whiteside executors) and respondents (First and American National Bank of Duluth, A. C. Weiss, Charles D. Brown, Robert W. Hotchkiss) with respect to the matters and things alleged in said intervening petition.' On March 27, 1937, the bankruptcy court entered its final decree in the reorganization proceedings adjudging, among other things, that the bank deliver the deed it held in escrow, and that 'the securities issued * * * in exchange for said deed, shall be delivered to said First and American National Bank of Duluth, to be held by said Bank in lieu of the collateral represented by said contract dated January 5th, 1927, and the payments due thereunder.'

On April 24, 1937, the bank petitioned the bankruptcy court for protection in making delivery of the deed, and the court, by an *ex parte* order, directed that the bank deliver the said deed to the judge of said court, to be by him deposited with the clerk of said court, and that said delivery should constitute compliance by the bank, as trustee, with the court order in the final decree of March 27, 1937. The plaintiff, Pickering Lumber Corporation, is the reorganized corporation growing out of said reorganization plan, and is composed of the bondholders, other creditors and stockholders of Pickering Lumber Company. On April 24, 1937, on further order of the bankruptcy court, the clerk of said court delivered said deed to plaintiff. Plaintiff promptly recorded the deed in California and began this action to quiet title.

The bank brought an action in the District Court of St. Louis County, Minnesota, to determine its right to a deficiency judgment on the Whiteside notes in case the proceeds from the sale of the securities received by it in the reorganization proceedings were insufficient to pay the same in full. The district court

adjudged that the bank would be entitled to such deficiency, and the Supreme Court of Minnesota affirmed the decision. (*First & American National Bank of Duluth* v. *Whiteside et al.*, 207 Minn. 537 (292 N. W. 770).)

(1) The legal questions involved in this maze of facts will now be considered and analyzed. Plaintiff contends that the effect of the contract of January 5, 1927, was to pass title to Pickering Lumber Company; that this contract gave the vendee all the rights of a mortgagor, and reserved to the vendor only the rights of a mortgagee, that it was, in effect, a deed. With this contention of the plaintiff we cannot agree. It is very plain that the contract was an executory contract of sale, and that title remained in the vendor. The language of the contract permits of no other construction. It states: 'Vendors shall sell and convey to the purchaser, and the purchaser shall purchase from the vendors, for the price and upon the terms and conditions hereinafter set forth, the lands.' It also states: 'If the purchaser shall pay for said lands as herein provided, the vendors shall, and they covenant that they will make, execute and deliver to the purchaser, a good and sufficient general warranty deed * * * conveying to the purchaser * * * title in fee simple to all of said lands.' It also states: 'When the purchaser has paid the entire purchase price as hereinabove provided * * * said bank shall deliver said deed to the purchaser.' Also, in providing for rights and remedies in case of default by the purchaser, the contract states: 'The vendors may, without prejudice to their position or rights as owners of the property, make such bid.' These clauses, and other language employed throughout the instrument, indicate that the vendor has rights far beyond those of a mortgagee; for instance, 'specific performance,' 'to bid on the property, and in the event that no bid or bids are received from others, higher than the highest bid of the vendors * * * the vendors may call the sale off, credit the amount bid, and sue for a deficiency.' No such rights are given

to a mortgagee. (*Fisher* v. *Chaffee,* 49 Cal. App. (2d) 97 (121 P. (2d) 51); *Stanislaus Water Co.* v. *Bachman,* 152 Cal. 716, 722, 723 (93 Pac. 858, 15 L. R. A. (N. S.) 359).) In fact, the language of the instrument is so plain that it did not transfer title, that it requires no further citation of authority. The case of *First & American National Bank of Duluth* v. *Whiteside,* 207 Minn. 537 (292 N. W. 770), *supra,* speaks of it as a contract of sale. After the execution of this contract, Whiteside still held title, subject to the first mortgage of the Detroit Trust Company.

(2) The next transactions involve the Whiteside 'collateral trust agreement' to the Duluth Bank to secure an issue of $400,000 of his notes, by means of which Whiteside 'sold, assigned, transferred, pledged and set over' to the bank all rights to the installments due on the Pickering contract on January 5, 1930, and January 5, 1931, with interest thereon, in trust as security for the holders of the notes, and also transferred all rights 'insofar as the same may be necessary or applicable to enforcing payment of said amounts from said Pickering Lumber Company'; and the subsequent agreement, in regard to the loan by the bank of $200,000, by which Whiteside assigned the final payment under the Pickering contract.

These were security transactions insofar as they affected the Pickering contract; they did not transfer Whiteside's title. He held the title to the land as security for these payments. This assignment, being a security transaction, created an equitable lien or mortgage on the Whiteside tract. (*Roller* v. *Smith,* 76 Colo. 371 (231 Pac. 656); *Farmers & Merchants Nat'l Bank* v. *Arrington* (Tex. Civ. App.) 98 S. W. (2d) 378; vol. 5, Tiffany Real Property (3rd ed.), Sec. 1573; vol. 4 Pomeroy's Eq. Jur. (5th ed.), Sec. 1259, page 763.) These authorities clearly determine that the effect of these transactions, insofar as Whiteside's land was concerned, was an equitable second mortgage on his land, held in trust by the bank. We must bear in mind that the bank owned the mortgage

but not the land. The Whiteside notes constituted the mortgage debt, and the land was Whiteside's security that Pickering Lumber Company would pay an amount sufficient to satisfy the Whiteside notes. This was a relationship existing between Whiteside and the bank, to which the Pickering Lumber Company was not a party. After the contract of January 5, 1927, Whiteside had a debt, claim, or chose in action against Pickering Lumber Company; Pickering Lumber Company was a party to that transaction, and this debt, claim, or chose in action Whiteside transferred to the bank as security for the payment of his notes. The value of this debt, insofar as the Pickering Lumber Company was concerned, depended entirely upon that company's ability to pay. The Pickering Lumber Company held no title to the Whiteside tract to back it up. Its value, insofar as the Pickering Lumber Company was concerned, did not depend upon the value of the Whiteside tract. The bank also received Whiteside's separate personal promise to pay the notes, backed by his financial ability to pay. Whiteside had the right to expect that if the bank required him to pay the notes, it would return his security, consisting of the equitable second mortgage.

At the time the plan of reorganization was proposed, what rights or interests did each party own? Pickering Lumber Company owned an executory contract giving it a right to purchase the Whiteside tract upon payment of the purchase price, and it also had a valuable equity therein for the payments it had already made. Duluth Bank held an equitable second mortgage on the Whiteside tract, as security for the payment of the Whiteside notes, these notes being the mortgage debt. Whiteside estate owned and held title to the Whiteside tract, subject to the equitable second mortgage held by the Duluth Bank, and the contract of purchase held by Pickering Lumber Company.

Who were the parties to the compromise plan or

purported accord and satisfaction? The Whiteside estate was not a party thereto, because its acceptance thereof was conditional upon full satisfaction of the Whiteside note obligations, which condition was never complied with. Therefore, the only parties to this compromise, insofar as it affects this case, were the Duluth Bank and Pickering Lumber Company, the bankrupt corporation. The Pickering Lumber Company agreed to transfer, and did transfer to the reorganized corporation, Pickering Lumber Corporation, all its rights and interest in the Whiteside tract, to-wit: Its equity therein, and its right to purchase and acquire title upon full payment of the purchase price; and the reorganized corporation, in consideration therefor, did agree to issue and deliver, and did so issue and deliver to Duluth Bank, a creditor of the bankrupt corporation, certain of its stock and securities, and Duluth Bank did agree to deliver to the reorganized corporation, and did deliver, the deed to the Whiteside tract, which it held in escrow, but was authorized to deliver only upon full payment of the purchase price of the Whiteside tract according to the contract of January 5, 1927; and it also undertook to relieve the bankrupt corporation from any further payments under the contract of January 5, 1927, and to pass to the reorganized corporation, title to the Whiteside tract, which was retained to Whiteside in said contract as security for such payment in full, and to still hold and retain to itself the equitable mortgage debt, to-wit: the Whiteside notes.

We believe that the attempt of the bank to pass title to land it did not own was futile, as was the attempt to separate the mortgage from the mortgage debt. To illustrate: 'A' owns a tract of land, subject to an executory contract of sale held by 'B,' on which X amount will become due, and must be paid before 'B' is entitled to title, and for the payment of which X sum, 'A' holds the title as security. 'A' borrows X amount from 'C' on his, 'A's' promissory note, and assigns the X amount coming to him from 'B' under

the contract to 'C' as security for the payment of the X amount of 'A's' note. This creates an equitable mortgage on 'A's' land, held by 'C,' and 'A's' note being the mortgage debt. It is obvious that 'C' cannot cancel the amount X, or any part of it, due 'A' under 'B's' contract, and for the payment of which 'A' holds title to the land as security, and pass title to the land to 'B' and still hold 'A' on his note. Under these circumstances the mortgage debt and mortgage cannot be separated. The fact that the land may have been of little or no value above the encumbrance did not give the parties the right to compromise and to transfer title to this land in the making of the accord and satisfaction. The owner of the land, no matter what its value, cannot be deprived of his property without due process, and the law has established the procedure which must be followed.

The equitable mortgage lien will subsist until the debt it was given to secure (Whiteside notes) is paid in full, or the mortgage lien foreclosed in the manner provided by law.

(3) Although a vendor is (in) an executory contract for the sale of land who retains title to such land as security for the payment of the purchase money, sues to recover the unpaid contract price, and obtains judgment thereon, which judgment has not been paid in full, the suit for the unpaid contract price, and recovery of such judgment does not affect the vendor's right to foreclose against such land held as security for any uncollected or unsatisfied portion of the purchase money. (*Longmaid* v. *Coulter,* 123 Cal. 208 (65 Pac. 791).)

(4) The equitable mortgage was executed by Whiteside, to secure his notes, and not Pickering Company's obligation to pay the contract price. The fact that Whiteside held title to the land to secure him for the payment of Pickering Company's contract obligation did not cause the Pickering Company's contract to be a mortgage, nor was the obligation of Pickering Company to pay the contract price, a mortgage debt. (13

Pomeroy's Eq. Jur., 4th ed., p. 3041, Sec. 1260; *Maltby* v. *Conklin,* 50 Cal. App. 201, 204 (195 Pac. 280).) The distinction being, that in a mortgage, the mortgagor holds title to the land, and the mortgagee has a lien on the land for the payment of the mortgage debt, while in an executory contract of sale, the vendor holds the title to the land as security for the payment of the purchase price, which is more effective than a lien. Nor did the assignment by Whiteside of his claim against Pickering Company under the contract, as security for the payment of his notes, change this obligation of Pickering Company under its contract, to a mortgage debt, because this assignment did not transfer the vendor's title to the land to Pickering Lumber Company.

(5) The contract of assignment is to be construed according to the laws of Minnesota, but any contract affecting title to real property situated in California is to be construed according to the laws of California. An 'equity of redemption' is an interest in real property. (*Graves* v. *Arizona Cent. Bank,* 205 Cal. 715 (272 Pac. 1063); *Grant* v. *Cumberland Valley Cement Co.,* 58 W. Va. 162 (52 S. E. 36).)

It is apparent that after the reorganization plan was consummated and approved by the federal court, unless the Whiteside estate was barred by the order and judgment of the said court, Whiteside's estate still held title to the land, subject to the equitable mortgage held by Duluth Bank, and the contract of sale of January 5, 1927, held by Pickering Lumber Corporation.

(6) We will now consider whether or not the judgment of the Federal Court is a bar to defendant's assertion of any claim to the lands in question.

Section 77-B of the Bankruptcy Act gives the bankruptcy court exclusive jurisdiction over the debtor's property and assets wherever situated. (Title 11, U. S. C. A., Sec. 207.) Executory contracts may constitute valuable assets, and it is customary in bankruptcy proceedings to either affirm or reject the obli-

gation thereon. Rejection would give the vendor a claim for damages, if any, and affirmance would give him a right to the contract price before title could be taken from him. (*Consolidated Gas, Electric Light & Power Co. of Baltimore* v. *United Rys. & E. Co.*, 85 F. (2d) 799; *In re Burgemeister Brewing Co.*, 84 F. (2d) 388, 389; *In re Ideal Laundry*, 10 F. Supp. 719; *In re Lake's Laundry*, 11 F. Supp. 237.) In the case at bar the bankruptcy court did not reject the contract. There is no doubt that if it had acquired jurisdiction over the parties, it had the right to require the contract to be performed; and if and when the contract was performed, to direct the delivery of the deed. It also had a right to direct a foreclosure on the securities held in the security transaction, as the security-holder (the bank), had submitted to its jurisdiction; but it had no jurisdiction over the Whiteside executors without bringing them in by proper process, or unless they voluntarily submitted to its jurisdiction. If it had ordered the bank to foreclose on its securities, the bank could only have sold the equitable mortgage, and the debt secured thereby, together and not separately. If the equitable mortgage and debt were sold and acquired by Pickering Company, it no doubt could then be foreclosed in the bankruptcy court (*In re Murel Holding Corporation*, 75 F. (2d) 941), provided the parties to the mortgage were before the court or submitted to its jurisdiction.

In this case the Whiteside executors came before the bankruptcy court by filing a petition in intervention to enjoin the bank from the threatened sale of securities unless it satisfied the claims which it had filed against the Whiteside estate. It is perhaps true that the bankruptcy court might have then tried, determined and adjudicated the issues between the bank and the Whiteside executors, as to the right to the delivery of the deed. If it can fairly be said it did this, the judgment of the bankruptcy court is *res adjudicata*, and, although perhaps erroneous, is a bar to defendants in this action; but if, as appears to

be the case, the petition was dismissed without prejudice, nothing was adjudicated thereby as against interveners. (*Goddard* v. *Security Title Ins. & Guar. Co.*, 14 Cal. (2d) 47 (92 P. (2d) 804); *North Carolina Ry. Co.* v. *Story*, 268 U. S. 288 45 S. Ct. 531, 69 L. Ed. 959), and they have no right to appeal and are not barred thereby. (*Brunswick Tire Corp.* v. *Credit Tire Stores, Inc.*, 8 Cal. App. (2d) 69, 70 (46 P. (2d) 804).)

The question to be determined then, is: Did the bankruptcy court adjudicate the question herein involved? The order of March 17, 1937, was that the bank should withdraw and discontinue the sale, and 'that the rights of said respondents (the bank and noteholders' committee), with respect to the matters and things alleged in intervener's petition herein, shall not thereby be prejudiced'; that is, the bank, noteholders and Whiteside executors were relegated to the same situation they had occupied before the notice of sale was started, and the court, in said order, reserved 'jurisdiction to hear and determine, insofar as it has jurisdiction to do so, all matters and things set forth in said intervening petition, at the time of the hearing upon the final decree in said reorganization proceedings.' On March 26, 1937, further hearing on intervener's petition was had. The court reaffirmed its former order, insofar as it had ordered withdrawal and discontinuance of the sale by the bank, reciting that 'it appearing to the court that the other controversies involved in said intervening petition are more properly cognizable in the courts of Minnesota.'

What were the other matters? According to the petition in intervention they were the satisfaction of the bank's claim against the Whiteside estate, and the surrender of all Whiteside's notes to the executors, and a direction to deliver the deed in exchange for the securities of the reorganized corporation. The order further continued: 'Except as above provided, said intervention petition be, and it hereby is, dismissed, without prejudice, however, to the rights of

said interveners and said respondents with respect to the matters and things alleged in said intervening petition.' That order meant that except as to the withdrawal of the sale, without prejudice to any rights of the bank of (or) noteholders' committee, the petition was dismissed 'without prejudice'. After this, the final decree was made, directing the delivery of the deed in exchange for the securities mentioned. But when, as was the case, the intervener's petition was dismissed 'without prejudice,' interveners were no longer before the court. They were not parties. They had filed no claim in the bankruptcy proceedings. They had no right to appeal, and the court had no power to take title to their land away from them.

Assuming that the bankruptcy court did have a right to order the bank to deliver the deed, which we believe it could not do without having the Whiteside executors as parties to the proceedings, it could not adjudicate their property rights. Therefore, the defendants are not bound by the decree in bankruptcy. In the case of *First and American National Bank* v. *Whiteside, supra,* the Minnesota court held this decree was not *res adjudicata* in that action, and we hold that it is not *res adjudicata* in this action.

Therefore, we determine that the defendants hold title to the Whiteside tract, subject to an equitable mortgage lien thereon for any unpaid remainder of the Whiteside notes, and also subject to the contract of January 5, 1927; and that the deed of record was delivered without authority, and conveys no title to the lands therein described, and will not become effective to transfer title until the full contract price is paid according to the terms of said contract of purchase.

The judgment is reversed, with directions that a judgment be entered adjudging defendants to be the owners and holders of title to the lands described in the complaint, subject, however, to a lien thereon for any unpaid remainder of the Whiteside notes, and

subject, further, to the terms and conditions of the contract of purchase of January 5, 1927.

Adams, P. J., and Thompson, J., concurred."

II.

Pertinent part of Section 573 of Division 3, Chapter 8, page 85, of Deering's Probate Code of California:

"Actions for the recovery of any property, real or personal, * * * or to quiet title thereto, or to determine any adverse claim thereon * * * may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates, * * *."

III.

Pertinent part of Section 4 of Article VI of Constitution of State of California:

"The Supreme Court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in municipal or justices' courts; also in all cases at law which involve the title or possession of real estate."

IV.

Pertinent parts of Section 4C of Article VI of the Constitution of the State of California:

"The Supreme Court shall have power to order any causes pending before the Supreme Court to be

heard and determined by a District Court of Appeal, * * *.

"The Supreme Court shall have power * * * to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a District Court of Appeal, or within fifteen days in criminal cases, or thirty days in all other cases, after such judgment shall have become final therein. The judgment of the District Court of Appeal shall become final therein upon the expiration of fifteen days in criminal cases, or thirty days in all other cases, after the same shall have been pronounced."

V.

Pertinent part of Section 1 of Rule XXX of the Supreme Court and District Courts of Appeal of the State of California, effective September 8, 1941:

"* * * application for a rehearing of any cause * * *, except a criminal cause, decided by a District Court of Appeal must be served on the adverse party and filed with proof of service within twenty days after the judgment is pronounced."

VI.

Pertinent part of Section 3 of Rule XXX of the Rules of the Supreme Court and District Courts of Appeal of the State of California, effective September 8, 1941:

"Application after a judgment of a District Court of Appeal has become final, for an order that the cause be heard and determined by the Supreme Court must be accompanied by a copy of the opinion of the

District Court of Appeal, showing the date of filing thereof, and must be served on the adverse party and filed with proof of service * * * within ten days * * * after the judgment of the District Court of Appeal has become final."

VII.

Pertinent part of Section 6 of Rule XXX of the Rules of the Supreme Court and District Courts of Appeal of the State of California, effective September 8, 1941:

"Petitions for hearing in the Supreme Court after decision of the District Court of Appeal will be granted only when it shall appear necessary in order to secure uniformity of decision or the settlement of important questions of law. Such petitions must embrace a statement of the grounds upon which necessity is claimed to exist, otherwise the petition shall be denied."

Subject Index

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 633

PICKERING LUMBER CORPORATION
(a corporation),
Petitioner,

vs.

SOPHIA WHITESIDE, ROGER V. WHITESIDE, WILLIAM C. ROBINSON, and JOHN D. LAMONT, as Executors of the Last Will and Testament of Robert B. Whiteside, sometimes known as Robert B. Whitesides, sometimes known as R. B. Whiteside, Deceased,
Respondents.

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE THIRD APPELLATE DISTRICT OF THE STATE OF CALIFORNIA AND BRIEF.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The facts of this case are exactly as stated in the opinion of the District Court of Appeal for the Third Appellate District of the State of California. This opinion is set forth in the Transcript of Record on file herein at pages 434 to 446, inclusive.

We rely upon this statement of facts of the District Court of Appeal. Under the practice in California if a party is of the opinion that the facts are incorrectly set forth in the opinion of a reviewing court, he may file a petition for rehearing and set forth his objections to the statement of facts. Petitioner herein did file such a petition for a rehearing by the District Court of Appeal, but, except for one ill-founded criticism which we will refer to later, no attempt was made therein to challenge the accuracy of the statement of facts made by that court. The petition for rehearing was denied.

Since the facts are fairly stated in the opinion of the court, there appears to be no reason for us to make a complete statement of facts herein. Some facts which the court did not deem essential to an understanding of its opinion were not set forth therein. Where necessary to meet the factual and legal arguments advanced by petitioner, we will refer to the Transcript of Record from time to time.

Due to the fragmentary nature of the purported statement of facts appearing in the petition, the omission of many material facts, and the distortion of certain facts and stipulations to meet the legal effect desired by peti-

tioner, a casual reading thereof gives an erroneous impression of what is involved in this case. It will, therefore, be necessary for us to refer to the record in order to correct the petitioner's statement of the case and the facts, which in many respects is not only inaccurate, but directly opposed to the facts set forth in the record.

I.

ERRORS IN PETITIONER'S STATEMENT OF THE NATURE OF THE CASE AND THE FACTS, AND ADDITIONS THERETO.

On page 6 of the petition it is asserted that "the Superior Court sustained petitioner's claim to title *and plea of res judicata* (R. 157, 161)". The record reference is to the judgment of the trial court, by which it was adjudged that petitioner herein was the owner in fee of the real property. Nothing in the judgment indicates that petitioner's plea of *res judicata* was sustained. Nor in the trial court's findings of fact and conclusions of law (R. 150-156) is there any finding one way or the other with reference to the plea of *res judicata*. So far as the record shows the plea of *res judicata* was not considered by the trial court.

On page 8 of the petition it is stated that the two assignments by Whiteside to the Duluth Bank of installments of the purchase price of the land and the instruments in connection therewith "assigned all of the rights conferred upon Whiteside by the purchase contract in so far as the same may be necessary or applicable to enforce payment by debtor of the entire unpaid balance of the purchase price". This, of course, was a part of the

"security transactions" referred to in the opinion of the District Court of Appeal. Legal title to neither the land nor the contract was transferred to the Duluth bank. The District Court of Appeal said with reference to these transactions that:

> "These were security transactions in so far as they affected the Pickering contract; *they did not transfer Whiteside's title. He held the title to the land as security for these payments.* This assignment, being a security transaction, created an equitable lien or mortgage on the Whiteside tract." (Authorities cited.)
>
> "These authorities clearly determine that *the effect of these transactions, in so far as Whiteside's land was concerned, was an equitable second mortgage on his land, held in trust by the bank. We must bear in mind that the bank owned the mortgage but not the land.* The Whiteside notes constituted the mortgage debt, and the land was Whiteside's security that Pickering Lumber Company would pay an amount sufficient to satisfy the Whiteside notes. . . . *Whiteside had the right to expect that if the bank required him to pay the notes, it would return his security*" (i. e.—the security he gave the bank) "consisting of the equitable second mortgage." (Parenthetical expressions and emphasis added.) (R. 440-441.)

On page 9 of the petition it is asserted that:

> "As the owner of $100,000 principal amount of the (Whiteside) notes the Duluth Bank filed claim in the bankruptcy proceedings upon $100,000 of the unpaid balance of the purchase contract, with interest (R. 174). . . . The Noteholders' Protective Committee, as holder of $200,000 principal amount of Whiteside notes, filed a claim in the bankruptcy proceedings upon $200,000 of the unpaid balance of the purchase contract (R. 174-5)."

The foregoing statements that these claims were filed "upon $100,000 of the unpaid balance of the purchase contract" and "upon $200,000 of the unpaid balance of the purchase contract" are not in accord with the record. The Stipulation of Facts, paragraph 13 (R. 174-175) shows that the four claims referred to in said paragraph 13 were filed *upon 5½% Gold Notes of Robert B. Whiteside.* The several claims themselves (Exhibits 11, 12, 13 and 14 to the Stipulation of Facts) (R. 241-264) are the best evidence that the claims were filed upon the Whiteside notes. It was also stipulated that Pickering Lumber Company was not indebted upon or obligated to pay the said notes of Robert B. Whiteside; and that no claims other than the four mentioned in paragraph 13 of the Stipulation of Facts were filed in the reorganization proceedings (R. 175).

Following the filing of the four claims against the debtor, the bankruptcy court made an "Order Allowing Claims as Classified and Disallowing Claims" (R. 291-293). It is of significance that in this order the court, after a hearing on the claims, allowed only the claim of First and American National Bank of Duluth, *"as owner, but not as trustee"*, in the amount of $100,000, and the claim of A. C. Weiss, Charles D. Brewer and Robert W. Hotchkiss, as a committee, existing under a noteholders' protective committee agreement, dated November 15, 1931, for $200,000.

By this order, which was final in character and binding upon both the bankrupt and the claimants named therein, the bankruptcy court recognized that the claims which it allowed were based upon the Whiteside notes. This was a judicial determination of the meaning of the Plan of

Reorganization to which reference will be made hereafter. The Duluth Bank was the owner of Whiteside notes of a face value of $100,000 and its claim (R. 243-245) as the owner of those notes was allowed. The claim alleged that those notes were *secured* by an agreement which assigned the sum of $100,000 due under the land contract between Whiteside and Pickering Lumber Company. The bank did not waive or release its security.

The claim of the Duluth Bank, as trustee (R. 241-243), was disallowed by the court because it recognized that the bank, *as trustee,* was not the owner of the notes described therein nor of the security for those notes. The security constituted a pledge in trust and the pledgee is not the legal owner of the pledged property.

Brewster v. Hartley, 37 Cal. 15, 99 A. Dec. 237;
1 *Bogert, Trusts and Trustees,* p. 155, Sec. 30;
California Civil Code, Secs. 2993, 2996, 2887;
Joint Pole Assn. v. Steele, 213 Cal. 233, 236, 2 Pac. (2d) 335;
Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250, 253.

Likewise for the same reasons the court disallowed the claim of the Duluth Bank, as trustee, based on Whiteside notes in an amount of $200,000, because those notes were in the hands of the Whiteside Noteholders Committee.

The statement of petitioner that these claims were filed upon the unpaid balance of the purchase contract cannot be sustained because neither the Duluth Bank, as an individual, nor the Whiteside Noteholders Protective Committee, had other than a beneficial interest in the security for the Whiteside notes. The security was in the con-

trol of the Duluth Bank, *as trustee.* The bank's claims, *as trustee,* were disallowed.

By allowing only the claims which the Whiteside noteholders personally filed on their notes, the bankruptcy court recognized that satisfaction of those notes was synonymous with performance of the contract for the reason that the amount due on the notes was exactly the same as the balance due under the land contract.

The Order Allowing and Disallowing Claims was entered by the bankruptcy court February 19, 1937 (R. 293), and on the same day the court, after making findings of fact, *inter alia,* that acceptances of said plan had been filed by the Duluth Bank, "as owner and holder of $100,000 principal amount of said 5½% Gold Notes", and by the members of the Noteholders Protective Committee "acting in behalf of the holders and owners of said 5½% Gold Notes in the aggregate principal amount of $200,000 (R. 298) "whose claims have been allowed and would be affected by the Plan" . . . (R. 300) made its order adjudging and decreeing that the plan of reorganization "is hereby in all respects confirmed" . . . (R. 301).

That said orders, of allowance and disallowance of claims, and confirming said plan, are adjudications that said plan of reorganization contemplated the satisfaction or discharge of the equitable mortgage lien and the indebtedness secured thereby, imposed upon the bankrupt and required by Whiteside, as equivalent satisfaction of the purchase contract.

In its Amended Answer to Cross-Complaint, Pickering Lumber Corporation admitted in response to allegations contained in paragraph XIX of the cross-complaint (R.

27), just as we contend, that "said plan of reorganization provided that the holders of said notes issued by Robert B. Whiteside . . . should receive, *in satisfaction of their allowed claims,* income bonds" and other securities described in the plan of reorganization (R. 125). Paragraph 8 of the bankruptcy court's final decree, however, directs that the securities

> "shall be delivered to said First and American National Bank of Duluth, to be held by said Bank in lieu of the collateral represented by said contract dated January 5, 1927, and the payments due thereunder." (R. 327, 331.)

The plan of reorganization contained no such provision as that set forth in the final decree. No mention was made of the Whiteside notes therein.

The obvious reason for this departure from the plan of reorganization is shown by the record. After the claims based on the Whiteside notes had been filed and allowed by the court, and just before the court had made its order confirming the plan (R. 293-308), pursuant to a petition dated February 11, 1937, the Probate Court of St. Louis County, Minnesota, on February 17, 1937, had made its "Order Instructing Representatives Relative to Delivery of Deed to Pickering Lumber Co." (R. 24-25). By this order the court authorized the delivery of the deed to the real property *upon condition of satisfaction of the claims filed against the Whiteside Estate by the Duluth Bank, as trustee, upon the Whiteside notes.* Certified copies of said order were served upon the bankrupt, its reorganization committee, and the Duluth Bank (R. 176-177; 24-25).

When the Duluth Bank became aware that it would be unable to accept the securities provided for it under the terms of the plan of reorganization, and still avail itself of its allowed claims against the Whiteside Estate based on the same notes, it attempted to exercise its rights as trustee and foreclose the pledged collateral and advertised the same for sale (R. 320). This is a further recognition of the fact that the Duluth Bank, as trustee, was not the assignee or legal owner of the land contract or the payments due thereunder.

In an endeavor to appease and placate the Duluth Bank, a shift of purpose was made in the reorganization plans. Neither the bank, as trustee, nor the adjudged holders of the allowed claims, were required to surrender or satisfy the Whiteside notes, but under the final decree the Duluth Bank was to hold the securities in lieu of the collateral represented by the payments due under the land contract. It is hard to believe that the bankruptcy court, or those engineering the reorganization, by their policy of appeasing the bank, intended to try and force the Whiteside Estate to contribute its property to the aggrandizement of the Pickering Lumber Company bondholders and stockholders. However, unless this premise is accepted, the only alternative is that the court intended to pass to the reorganized corporation the only interest in the property which the debtor had, to-wit, an equity under the contract of purchase, and leave the matter of acquiring title to the land to negotiation or litigation. Petitioner herein voluntarily chose litigation. It came to California and by filing suit to quiet title submitted to the jurisdiction of the California courts. That jurisdiction

has been exercised, the law has been properly applied, and the perpetration of a gross fraud upon respondents herein has been prevented.

We make this correction because of many misleading assertions of purported facts set forth in the petition, briefly, to the effect that the claims were filed on the Pickering contract, and that the Duluth Bank was the owner or assignee of the Pickering contract. The form of these claims, the negotiations between the Pickering Lumber Company Bondholders Committee and the Whiteside noteholders and the bank, the plan of reorganization, and other factors in the case, all combined to lead respondents herein to believe that it was the intention to satisfy and discharge all of the Whiteside notes in accordance with the plan of reorganization and order of the Probate Court of St. Louis County, Minnesota. The order of the probate court appears in the record at pages 24-25. This was not done, however; the bankruptcy court left the Whiteside notes unsatisfied and the Whiteside Estate with an unsatisfied judgment against it based on the Whiteside notes in an amount of $319,794.52 (R. 172). Interest on this judgment has been accruing ever since March 6, 1933.

That it was the manifest intention to satisfy the Whiteside notes is made clear by a consideration of the negotions which resulted in the plan of reorganization. These negotiations, looking toward the satisfaction of the Whiteside notes, were opened by Pickering Bondholders Committee (which Committee proposed the plan of reorganization), through E. C. Cronwall, a member thereof, with the Whiteside Noteholders Committee. Through these

negotiations he proposed giving "preferred stock of the reorganized Pickering Lumber Company *par for par* for the $300,000 Whiteside notes, and in addition they were to receive 3,000 shares of the common stock" (R. 366).

That proposal being unacceptable, Cronwall attended a meeting with the Whiteside Noteholders Committee at Duluth, Minnesota, on May 6, 1936, and suggested that they make a counter proposal, as what his committee "were interested in was to see about the best deal that could be made in the interest of the Pickering bondholders *to take care of the Whiteside notes* . . . We realize that to satisfy the first mortgage which the Bondholders Protective Committee owned, and to pay up the balance due on the Whiteside tract, would result in acquiring the deed and the title to the timber" (R. 385).

On May 6, 1936, Whiteside Noteholders Committee and the Duluth Bank, as the holders of the Whiteside notes, submitted their counter proposal, in writing, addressed to Pickering Lumber Company Bondholders Committee, by which they agreed to accept certain stocks, plus certain bonds, and "release the above mentioned claim against the Pickering Lumber Company", and deliver the deed to the lands which at the time of the execution of the purchase contract had been put in escrow with the Duluth Bank to be delivered by it only upon full payment of the purchase price, with interest (R. 19-20; 39). The executors of the Whiteside Estate consented to the above agreement, *subject to the approval of the Probate Court of St. Louis County, Minnesota* (R. 20).

On page 10 of the petition reference is made to pages 52 and 53 of the record and it is said that under the

subheading "Creditors Holding Junior Liens" in the plan of reorganization, there was described the unpaid balance on the purchase contract in the principal amount of $300,000, together with accrued interest to December 1, 1934, in the sum of $52,250. This statement is directly contrary to the record. The plan of reorganization described the Whiteside notes as liabilities of the debtor. We quote the record (R. 53):

> "II. Creditors holding junior liens.
>
> C. *Claims arising on notes of R. B. Whiteside and Sophia Whiteside, his wife,* secured by purchase money contract.....$300,000.00
>
> Accrued interest to December 1, 1934 ..... 52,250.00"

On page 11 of the petition it is alleged that the bonds and stocks issued by petitioner as prescribed by the plan were distributed to the Duluth Bank and the Noteholders' Committee *in satisfaction of claims for the entire unpaid balance on the purchase contract.* Reference is made to the Stipulation of Facts, page 181 of the record. Paragraph 24 of the Stipulation of Facts is not subject to the construction attempted to be placed thereon by petitioner. As we have heretofore pointed out the plan contemplated the satisfaction of the Whiteside notes. It was stipulated (R. 181) that when these securities were delivered, the bank, as trustee, did not deliver to Pickering Lumber Corporation any of Whiteside's 5½% notes. If they had been delivered up for cancellation as was contemplated, this litigation would never have been instituted. Such action was taken with reference to Mr.

Whiteside's notes which were secured by a first mortgage held by Detroit Trust Company (R. 182).

In discussing the meaning of the plan of reorganization, it is important to note that not only do the Pickering Lumber Company bondholders retain an interest in Pickering Lumber Corporation, *but the Pickering Lumber Company stockholders also retain an interest therein.* Before either the Pickering Lumber Company bondholders or the Pickering Lumber Company stockholders could derivatively (through the contract of Pickering Lumber Company) acquire any rights in the Whiteside tract to the exclusion of the Whiteside Estate, the Whiteside Estate was entitled to full and complete compensation for that tract in accordance with the terms of the contract. In the instant case complete compensation could be made only by satisfying Whiteside's notes of 1925 and 1928, or paying the price. Any reorganization which would seek to take the Whiteside tract from the Whiteside Estate without rendering that full and absolute compensation and yet would seek to preserve to bondholders and stockholders an interest in the reorganized company would be a gross fraud, subject to judicial denunciation, unenforceable in a court of law or equity, and in contravention of constitutional principles of due process.

The plan of reorganization, if construed as Pickering Lumber Corporation now contends, would provide for just that sort of fraud. Hence the plan cannot be so construed, for it is a cardinal canon of construction that "A contract must receive such an interpretation as will make it lawful".

California Civil Code, Sec. 1643;

6 *Cal. Jur.* 268, Sec. 168;

12 *Am. Jur.* 793-794, Sec. 251;
6 *R. C. L.* 839, Sec. 229;
17 *C. J. S.* pp. 735-744, Secs. 318-320.

The fraud involved in the construction of the plan which Pickering Lumber Corporation now seeks to force upon the Whiteside Estate is again considered in the recent case of *Consolidated Rock Products Co. v. Du Bois,* 312 U. S. 510, 85 L. Ed. 982, 61 S. Ct. 675, which once more recognizes

> "The full and absolute priority rule of Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. Ed. 931, 33 S. Ct. 554, and Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 84 L. Ed. 110, 60 S. Ct. 1, 41 Am. Bankr. Rep. (N. S.) 110."

The "absolute priority rule" was applied in those decisions to insure that stockholders received nothing until bondholders or other creditors were fully provided for.

A conditional vendor of a bankrupt corporation undergoing reorganization when his contract is not rejected occupies a position prior to both bondholders and stockholders of the bankrupt corporation, for the property contracted to be sold is the vendor's until the full purchase price is paid.

The "absolute priority rule", as applied to this case, simply means that the Whiteside Estate was entitled to everything that Whiteside contracted for before the land could be taken into the reorganization. The plan of reorganization proposed to give the Whiteside Estate what Whiteside had contracted for by accomplishing the satisfaction and discharge of Whiteside's notes of 1925 and 1928. This was no more than was equitable.

WITH REFERENCE TO THE INTERVENTION OF RESPONDENTS IN THE BANKRUPTCY PROCEEDINGS.

On page 12 petitioner has asserted that on March 13, 1937, respondents appeared *generally* and filed an intervening petition in the bankruptcy proceedings. The petition was filed by leave of the court first had and obtained. The parties named therein were:

> "Sophia Whiteside, Roger V. Whiteside, William C. Robinson and John D. Lamont, Executors of the Last Will and Testament of R. B. Whiteside, Deceased,
>
> Interveners,
>
> VS.
>
> First and American National Bank of Duluth, A. C. Weiss, Charles D. Brewer, and Robert W. Hotchkiss,
>
> Respondents." (R. 310.)

In the intervening petition the facts relative to the filing of claims against the debtor, Pickering Lumber Company, based on the Whiteside notes by the Duluth Bank and the Whiteside Noteholders Protective Committee were alleged. (R. 316). The allowance of those claims by the bankruptcy court, and the listing of those claims on Whiteside's notes in the plan of reorganization were also alleged (R. 317). The making of an order by the Probate Court of St. Louis County, Minnesota, in which court the Whiteside Estate was being probated, setting forth the terms upon which the deed to the real property in question might be delivered, and the apparent intention of the Duluth Bank, as trustee, to refuse to carry out the terms of the plan of reorganization and the order of the probate court, were also alleged (R. 318-320). No claim was asserted by respondents herein against Pick-

ering Lumber Company, the debtor, nor against any of its assets or property. The only persons participating in the hearing on March 17, 1937, were the interveners and the respondents named in the intervening petition (R. 326-327). Respondent therein, Duluth Bank, as trustee, was ordered to withdraw and discontinue its notices of sales under the collateral trust agreements, and the court reserved jurisdiction to hear and determine in so far as it had jurisdiction all matters and things set forth in the petition at the time of the hearing upon the final decree *or at such other time as the court might fix* (R. 327).

The intervening petition was further heard by the court on March 26, 1937, as stated by the District Court of Appeal in its opinion, only the Whiteside Executors and the Duluth Bank and the members of the Whiteside Noteholders Committee participating as parties (R. 332-333). *On March 27, 1937, the court signed an order dismissing the intervening petition without prejudice to the rights of said interveners and said respondents with respect to the matters and things alleged in said intervening petition* (R. 333).

On March 27, 1937, the final decree in the reorganization proceeding was also signed. This decree required the Duluth Bank to deliver the deed (held by it in escrow under the terms of the contract of sale) to Pickering Lumber Corporation, when organized, and to hold the securities provided in the plan of reorganization in lieu of the collateral represented by the contract dated January 5, 1927, and the payments due thereunder (R. 331).

While it was stipulated between the parties herein that the hearing on the final decree and the hearing which

resulted in the order on the intervening petition were heard together by said court and said order and said final decree were entered simultaneously (R. 180), an examination of the recitals in said order on the intervening petition shows that that matter was heard on March 26, 1937, and dated March 27, 1937 (R. 332-333). The recitals in the final decree show that the hearing thereon was held on the same day it bears date, to-wit, March 27, 1937 (R. 331).

II.

PETITIONER'S STATEMENT OF GROUNDS UPON WHICH IT IS CLAIMED QUESTIONS INVOLVED ARE SUBSTANTIAL.

In the petition, pages 26 to 28, petitioner claims the questions asserted by it to be involved here are of paramount public importance, and manifests a groundless concern that the questions litigated in the bankruptcy court must be relitigated at the instance of any creditor or stockholder. Fear is also expressed that if a state court is held to have the right to protect the owner of land against assertions of title thereto by a reorganized corporation that the objectives of Congress in enacting the statute to rehabilitate debtors by freeing them from burdensome obligations will be frustrated.

We believe that the eyes of this court will be keen to discern that this reorganized corporation is not so concerned with being relieved of burdensome obligations as it is with the probability that it may not be permitted to gain title unjustly to this valuable property without performing the obligation which Pickering Lumber Company

agreed to perform when it made its contract to purchase the land in 1927.

The debtor and those who were manipulating the reorganization proceedings were careful at all times to see that this purchase contract was not rejected by the bankruptcy court neither in plan or decree. If the debtor desired to be relieved of the conditions of the contract relating to the purchase price, the court undoubtedly could have been prevailed upon to reject the contract and the debtor would have been freed from personal liability.

Petitioner while stressing its alleged rights under the Bankruptcy Act fails to recognize that if its claims were sustained, the rights of respondents arising under the due process clause of the United States Constitution would most certainly be impaired.

The bankruptcy power, like other great substantive powers of Congress, is subject to the due process clause of the Constitution of the United States.

> *Louisville Joint Stock Land Bank v. Bradford,* 295 U. S. 555, 79 L. Ed. 1593-1604, 55 S. Ct. 854;
> *In re Tennessee Publishing Company,* 81 Fed. (2d) 463, affirmed on other grounds in 299 U. S. 18, 81 L. Ed. 13, 57 S. Ct. 85.

Respondents in their "Further Amendment To Answer To Complaint to Quiet Title to Real Property and Cross-Complaint" (R. 87-88) specifically pleaded that if the construction contended for by petitioner herein were to be given to the final decree or to Section 77B of the Bankruptcy Act such construction would deprive respondents of their property without due process, and this

proposition was urged upon each of the courts of the State of California. The trial court ignored respondents' plea, but the District Court of Appeal, recognizing that the Constitution of the United States is paramount, held that the bankruptcy court could not, and did not, adjudicate the property rights of respondents since they were not parties to the proceedings.

This holding is in full accord with many decisions of this court, and of the Supreme Court of California, which are cited in a later portion of this reply.

III.

THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT AND THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Under Rule 7 of the Rules of the Supreme Court, subdivision 3, no motion by respondent to dismiss a petition for writ of certiorari will be received. However, this rule permits objections to the jurisdiction of this court to grant a writ of certiorari to be included in the brief of respondent in opposition thereto. Accordingly respondents here respectfully present their objections to the jurisdiction of this court to grant the writ prayed for by petitioner as follows:

1. The decision of the District Court of Appeal was based upon local law of the State of California relating to real property located therein.

2. No substantial federal question is involved since Section 77B of the Bankruptcy Act does not purport by its terms to grant title to property owned by the Whiteside Estate to Pickering Lumber Company or to its successor in interest, the petitioner herein, nor does the final decree of the bankruptcy court made in the reorganization proceedings of Pickering Lumber Company purport to transfer title from the Whiteside Estate to said debtor or its successor.

3. The plea of *res judicata* is sham.

4. Although the District Court of Appeal did determine in its opinion that the debtor did not acquire title to the real property in question by virtue of the provisions of the final decree and that anything adjudged in that decree was not *res judicata* as to respondents herein, such determination was not required since the decision is properly grounded on a non-Federal ground.

A. THE AUTHORITIES IN SUPPORT OF THIS PROPOSITION.

A petition for writ of certiorari to review a judgment of a state court will be denied if that judgment rests upon a non-Federal ground adequate to support it.

City of New York v. Central Savings Bank, 306 U. S. 661, 83 L. Ed. 1058, 59 S. Ct. 790;

Lynch v. New York, 293 U. S. 52, 79 L. Ed. 191, 55 S. Ct. 16.

The Federal Supreme Court will not take jurisdiction of a writ of error to a state court whose judgment rests on a non-Federal ground adequate to support it. Under

such circumstances the existence of a Federal question is of no significance.

Bilby v. Stewart, 246 U. S. 255, 62 L. Ed. 701, 38 S. Ct. 264;

Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 61 L. Ed. 1153, 37 S. Ct. 643;

Scott v. Kelly, 89 U. S. 57, 22 L. Ed. 729;

Farson, Son & Company v. Bird, 248 U. S. 268, 63 L. Ed. 233, 39 S. Ct. 111;

Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 41 L. Ed. 72, 16 S. Ct. 939.

Where the judgment of a state court rests upon two grounds one of which is Federal and the other non-Federal in character, the Supreme Court of the United States is without jurisdiction to review if the non-Federal ground is independent of the Federal ground and adequate to support the judgment.

Fox Film Corporation v. Muller, 296 U. S. 207, 80 L. Ed. 158;

Klinger v. Missouri, 13 Wall. 257, 263, 20 L. Ed. 635, 637;

Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 163-165, 61 L. Ed. 644, 648, 649, 37 S. Ct. 318;

Petrie v. Nampa & M. Irrig. Dist., 248 U. S. 154, 157, 63 L. Ed. 178, 179, 39 S. Ct. 25;

McCoy v. Shaw, 277 U. S. 302, 72 L. Ed. 891, 48 S. Ct. 519;

Eustis v. Bolles, 150 U. S. 361, 37 L. Ed. 1111, 14 S. Ct. 131.

The case of *Scott v. Kelly,* 89 U. S. 57, 22 L. Ed. 729, appears to be particularly applicable to the facts of the case at bar. It involved a question of ownership of certain funds in the hands of garnishees which funds were claimed by Kelly, as Sheriff, and by assignees in bankruptcy. This court there dismissed the writs of error for want of jurisdiction, saying:

> "The assignees in bankruptcy voluntarily submitted themselves and their rights to the jurisdiction of the State Court. Being summoned, they appeared, without objection, and presented their claim for adjudication by that court. No effort was made to remove the litigation to the courts of the United States. It is now too late to object to the power of the State Court to act in the premises and render judgment. Mays v. Fritton (ante, 389).
>
> The question presented for the decision of the State Court was not whether, if the bankrupt had title, it would pass to his assignees by the operation of the Bankruptcy Act, but whether he had title at all. The court decided that he had not. Such a decision by a State Court does not present a question of which this Court can take jurisdiction upon a writ of error."

Title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate. The decisions in support of the above proposition are legion. We cite the following decisions of this court in support thereof.

United States v. Crosby, 7 Cranch 115, 3 L. Ed. 287;
Clark v. Graham, 6 Wheat. 577, 5 L. Ed. 334;
Kerr v. Moon, 9 Wheat. 565, 6 L. Ed. 161, 163;
McCormick v. Sullivant, 10 Wheat. 192, 202, 6 L. Ed. 300, 303;

Taylor v. Benham, 5 How. 233, 273, 12 L. Ed. 130, 149;

McGoon v. Scales, 9 Wall. 23, 19 L. Ed. 545;

Brine v. Insurance Co., 96 U. S. 627, 639, 24 L. Ed. 858, 861;

Schley v. Pullman Co., 120 U. S. 575, 580, 30 L. Ed. 789, 790, 791, 7 S. Ct. 730.

1. **The decision of the District Court of Appeal was based upon local law of the State of California relating to real property located therein.**

Petitioner (plaintiff and respondent in the courts of California) claimed title to the land in question under several conflicting theories. First, in its complaint filed May 27, 1937, it alleged:

> "Plaintiff above named is now and by its predecessors in title has been, *for many years last past* and immediately preceding the commencement of this action, the sole owner in fee simple absolute and in possession of all those certain pieces, parcels and lots of land . . ." (R. 2.)

Second, in its Reply to Answer and Answer to Cross-Complaint petitioner herein alleged:

> ". . . alleges that *plaintiff claims title under said deed*" (the deed which was executed by Robert B. Whiteside and Sophia Whiteside, his wife and placed in escrow with The First National Bank of Duluth and thereafter delivered to plaintiff by First and American National Bank of Duluth, as successor of The First National Bank of Duluth) "*and likewise claims title under a written contract* made and entered into by Robert B. Whiteside, Sophia Whiteside, his wife, and Pickering Lumber Company, dated January 5, 1927, . . ." (R. 90.)

> ". . . plaintiff alleges that said written agreement dated January 5, 1927, was an executed conveyance of the real estate described therein, the same being the real estate described in plaintiff's complaint, that by said written agreement Robert B. Whiteside and Sophia Whiteside conveyed all of their right, title and interest in and to said real estate to Pickering Lumber Company, subject only to the first mortgage hereinabove mentioned; that when said written agreement was made and entered into it was the intent of Robert B. Whiteside and Sophia Whiteside, his wife, and of Pickering Lumber Company that said written agreement should convey title to all of said real estate therein described (the same being also described in Plaintiff's Complaint) to Pickering Lumber Company, and said instrument did convey the title to said real estate to Pickering Lumber Company, subject only to said first mortgage." (R. 92.)

Further allegations of title by the written agreement of January 5, 1927, are also contained in said reply to Answer and Answer to Cross-Complaint (R. 94, 95), and it was alleged that Robert B. Whiteside and wife did not reserve the title but only reserved a lien upon the real estate to secure the unpaid balance of purchase price.

Third, petitioner herein alleged it claimed title by virtue of the bankruptcy proceeding of the Pickering Lumber Company (R. 90).

Fourth, petitioner herein alleged that by the final decree in the bankruptcy proceedings it was "finally adjudicated that the defendants have no right, title or interest in, to or against any of the property of this plaintiff or any of the property of Pickering Lumber Company, and that defendants have no claim or demand against this plaintiff

or any of its property, and the defendants are by said decree estopped to claim and enjoined from claiming any right, title or interest in or to the property described in plaintiff's complaint" (R. 127).

(a) The District Court of Appeal held that plaintiff's predecessor, Pickering Lumber Company, did not gain title by virtue of the contract of sale of January 5, 1927, saying:

> "With this contention of plaintiff we cannot agree. It is very plain that the contract was an executory contract of sale, and that title remained in the vendor. The language of the contract permits of no other construction. . . . After the execution of this contract, Whiteside still held title, subject to the first mortgage of the Detroit Trust Company" (R. 439-440).

This decision was based upon the law of California. The court said in its opinion:

> ". . . any contract affecting title to real property situated in California is to be construed according to the laws of California" (R. 443).

(b) The District Court of Appeal held that plaintiff (petitioner herein) failed to gain title by virtue of the deed which had been deposited in escrow with the Duluth Bank and which it was authorized to deliver only upon full payment of the purchase price of the Whiteside tract according to the contract of January 5, 1927, saying:

> "These were security transactions insofar as they affected the Pickering Contract; they did not transfer Whiteside's title. He held the title to the land as security for these payments. This assignment, being a security transaction, created an equitable lien or

mortgage on the Whiteside tract. . . . We must bear in mind that the bank owned the mortgage but not the land." (R. 440.)

"Who were the parties to the compromise plan or purported accord and satisfaction? *The Whiteside estate was not a party thereto,* because its acceptance thereof was conditional upon full satisfaction of the Whiteside note obligations, which condition was never complied with. . . . *We believe that the attempt of the bank to pass title to land it did not own was futile, as was the attempt to separate the mortgage from the mortgage debt.* . . . Under these circumstances the mortgage debt and mortgage cannot be separated. The fact that the land may have been of little or no value above the encumbrance did not give the parties the right to compromise and to transfer title to this land in the making of the accord and satisfaction. The owner of the land, no matter what its value, cannot be deprived of his property without due process, and the law has established the procedure which must be followed." (R. 441-442.)

This decision that the act of the Duluth Bank in delivering the escrowed deed did not operate to transfer title to the California land is based on the law of California. The court held that since the Whiteside Estate did not agree to the accord and satisfaction except upon conditions which were not observed, the Duluth Bank had no authority to deliver the deed or pass title to the land, because by so doing it would constitute an attempt to separate the mortgage debt (Whiteside's notes) from the mortgage (the equitable mortgage on the land) contrary to the law of California.

No Federal question was involved in the determination by the District Court of Appeal that Pickering Lumber

Company, and its successor in interest, petitioner herein, did not acquire title by reason of the claims hereinbefore referred to. The decision was based on California real property law alone, and the grounds thereof are adequate to support the judgment.

2. **No substantial Federal question is involved since Section 77B of the Bankruptcy Act does not purport by its terms to grant title to property owned by the Whiteside Estate to Pickering Lumber Company or to its successors in interest, nor does the final decree of the bankruptcy court purport to transfer title from the Whiteside Estate to said debtor or its successor.**

The third and fourth grounds of title claimed by petitioner were based on the bankruptcy proceedings of the Pickering Lumber Company, and the final decree entered therein.

All of the papers filed in the reorganization proceedings recognized that the bankrupt did not have the legal title to the real property here involved. The plan of reorganization is conclusive on that question. That plan proposed the acquisition of the escrowed deed by the satisfaction of Whiteside's notes as we have heretofore shown in an earlier part of this reply.

In 1934 when Pickering Lumber Company filed its petition under Section 77B of the Bankruptcy Act, as amended, for corporate reorganization, it did not claim to be the legal owner of the real property in question. The allegation of the petition is:

> "Your petitioner is obligated under a contract entered into with R. B. Whiteside and Sophia Whiteside, his wife, dated January 5, 1927, for the purchase of tracts of timber, on which contract there is now due and owing by your petitioner the sum of $600,-

000.00, together with unpaid interest thereon in the sum of $98,750.00." (R. 215.)

In the plan of reorganization dated November 1, 1936, which was filed in the bankruptcy court, these securities, debts, and interests dealt with in the reorganization were described as follows (R. 52-53):

"B. Claim arising on first mortgage notes of R. B. Whiteside and Sophia Whiteside, his wife..... $300,000.00
Accrued interest to December 1, 1934 ..... 52,500.00

II. Creditors Holding Junior Liens.

C. Claims arising on notes of R. B. Whiteside and Sophia Whiteside, his wife, secured by purchase money contract..... 300,000.00
Accrued interest to December 1, 1934 ..... 52,250.00"

In the same plan, under the heading "Property of the Reorganized Company", the following appears:

"The Reorganized Company would acquire all of the property *now owned* by the lumber company, free and clear of all liens of any kind or nature, except real estate and personal property taxes which, at the time of the transfer, are a specific lien on said property, . . ." (R. 56.)

Of course, at the time of the filing of the plan of reorganization it was admitted therein that it did not have title to the Whiteside tract.

Under Section D of the Plan, under the heading, "Distribution of New Securities", appears the following:

"D. Claim Arising on First Mortgage Notes of R. B. Whiteside and Sophia Whiteside:

The payment of this note in the sum of $300,000.00, plus interest was assumed by the Company at the time it contracted to acquire the valuable Whiteside timber lands. This note, plus accrued interest to December 1, 1934, amounting to $52,500.00, has heretofore been purchased by the Bondholders' Committee for the sum of $195,000.00, plus certain carrying charges and the amount of accrued taxes, making a total sum of $227,556.25. To make this purchase, the Bondholders' Committee made a loan bearing interest at the rate of 3½% per annum, secured by the pledge of this note. This obligation of the Bondholders' Committee will be paid, the Whiteside First Mortgage Note will be cancelled, and the mortgage released of record.

II. Creditors Holding Junior Liens.

C. Claim arising on the Notes of R. B. Whiteside:

These notes were made subsequent to the execution of the contract by which the Company agreed to purchase the Whiteside tract and are secured by a pledge of said contract. The holders of these notes will receive Income Bonds, Series 'B', in the sum of $105,000, 1950 shares of Convertible Preferred Stock, and 3,000 shares of Common Stock and will transfer title to the Whiteside tract to the Reorganized Company." (R. 63-64.)

There are other references in the record which likewise show that all persons interested in the reorganization proceedings of Pickering Lumber Company recognized that title to the Whiteside land was vested in the Whiteside Estate.

From the order confirming the plan of reorganization made by the bankruptcy court, it appears (R. 293, 301):

> "That all of the *property and assets of the debtor,* of every kind and character, and wheresoever situated, constitute the property which is dealt with by the Plan of Reorganization".

The contract to purchase the land was an asset of the debtor; the land itself was not the property of the debtor. Hence the plan did not deal with it.

Paragraph 8 of the bankruptcy court's final decree does not purport to adjudicate anything concerning the rights of the Whiteside Estate. That paragraph upon which petitioner relies for his entire contention of *res adjudicata* reads as follows:

> "8th: That First and American National Bank of Duluth shall deliver to Pickering Lumber Corporation, when organized, the deed held by it in escrow under the agreement between R. B. Whiteside and Sophia Whiteside and the debtor dated January 5, 1927, and the securities to be issued as provided in said Plan of Reorganization in exchange for said deed shall be delivered to said First and American National Bank of Duluth, to be held by said Bank in lieu of the collateral represented by said contract dated January 5, 1927, and the payments due thereunder." (R. 327, 331.)

The above paragraph from the final decree mentions neither the Whiteside Estate, nor the executors thereof. Nor does it purport to adjudicate their rights in the property in any respect. It simply provides for a manual exchange at an indefinite date in futuro of a physical object then in existence (the deed) for other physical

objects not then in existence (Pickering Lumber Corporation's securities). One of the parties to the future exchange was the corporation in physical possession of the deed, First and American National Bank of Duluth. The other party, Pickering Lumber Corporation, was not in existence.

Paragraph 8 in no wise declares that the Whiteside Estate will be divested of title to the Whiteside tract when the exchange takes place. To attribute such an effect to the decree would be to assert that the court was determining the legal effect of acts and deeds not yet performed so as to bind persons not before the court.

The assertion of title by petitioner based upon the final decree which does not even purport to adjudicate title fails to present more than a pretense of a federal question. Certainly it fails to present a substantial federal question worthy of the attention of this court.

The effect of such transfer was designedly left for determination by the courts of the State of California where the property is located. Such must have been the understanding of petitioner herein; otherwise, why was this suit to quiet title to the land so promptly brought in Tuolumne County, California?

Petitioner asserts that the bankruptcy court had jurisdiction over the real estate since the debtor was in possession of the property, and hence *could* adjudicate title thereto. There is no point in arguing over the question of whether the court could adjudicate title. The fact is that it did not attempt to do so.

Thompson v. Magnolia Petroleum Co., 309 U. S. 478, is cited in support of its contention. That case, how-

ever, involved a case where there was a real controversy between the parties as to the ownership of the fee. The bankruptcy court ordered the proceeds of the oil underlying the property to be impounded and held for the account of the rightful owner as might thereafter be determined by the bankruptcy court. This court approved the conservation measures ordered by the lower court, *but directed that the question of fee simple ownership of the land be submitted to the courts of the State of Illinois,* saying:

> "Unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of Federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme."

In the *Thompson* case the bankruptcy court did not make any attempt to adjudicate who was the owner of the land, although there the parties to the action were each actively claiming ownership of the fee.

In the case at bar no controversy arose in the bankruptcy court between the debtor and any other person, firm, or corporation concerning the legal ownership of the land in question. The fact that the Whiteside Estate was the legal owner of the property was recognized at every stage of the proceedings. Indeed, petitioner, by taking the position that the court acquired jurisdiction over the real property by virtue of the possession thereof by the debtor, must admit that the legal ownership was vested in the Whiteside Estate.

Under the contract of purchase, the debtor was entitled to the possession of the land and was constructively in possession thereof. No attempt was made by anyone during the reorganization proceedings to interfere with that constructive possession. There was no need for the Whiteside Estate to make any claim for possession since there had been no cutting of the timber (R. 403), and since the contract of sale provided that no timber should be cut or removed without the consent of the seller while the purchaser was in default as to any of the covenants, agreements, or conditions of the contract (R. 32, 37). Hence, the possessory powers of the bankruptcy court were never invoked or exercised with respect to the property.

A reorganization court does not operate *in rem* upon property in possession of the debtor in the sense of adjudicating its ownership as against the world regardless of the subjection to the jurisdiction of the court of persons affected by the court's decree. The reorganization court deals only with the property and debts of the debtor. It is not a part of its function to change the ownership of property. The reorganized company takes only the title of its predecessor. While a reorganization court may require persons to litigate therein or in the state courts the question of the ownership of property in the possession of the debtor, no such action was taken by the court in the case at bar for the obvious reason that the ownership and legal title of respondents herein was conceded throughout the reorganization proceedings.

An owner of property may bring an appropriate action to recover possession of his property against the reor-

ganized corporation. Such a proceeding is not a collateral attack on orders of the reorganization court for the orders of such a court deal only with the interest of the debtor in the property.

Finletter, The Law of Bankruptcy Reorganization (1939 Ed.), pp. 675-679.

Under the bankruptcy power Congress may impair or destroy the obligation of contracts. But there is a significant difference between property rights and a mere debtor-creditor relation. Exercise of the bankruptcy power does not permit the destruction of property rights. An attempt to do so is an attempt to violate the Fifth Amendment to the Federal Constitution.

Ginsberg v. Lindel, 107 F. (2d) 721, 726 (C. C. A. 8).

Under Section 77B of the Bankruptcy Act jurisdiction is given to the bankruptcy court to "deal with all or any part of the property of the debtor". It also provides that the property dealt with by the plan (i. e., the property of the debtor) when transferred and conveyed by the trustee or trustees to the reorganized corporation shall be free and clear of all claims of the debtor, its stockholders and creditors.

No jurisdiction is given by the Act to deal, transfer or convey to the reorganized corporation property belonging to a person other than the debtor.

Any attempt by the court to deal with property of a third person is beyond its jurisdiction, and a judgment, decree or order of the court purporting to deal with or convey title to property not owned by the debtor is, in so far as it relates to that property, a nullity and void. Such an act is in contravention of its authority.

The foregoing principle was clearly enunciated in the case of *Vallely v. Northern Fire & Marine Insurance Co.*, 254 U. S. 348, 65 L. Ed. 297, 41 S. Ct. 116, where it appeared from the averments of a petition in involuntary bankruptcy that the person proceeded against was an insurance corporation. The Bankruptcy Act in effect at the time provided that any moneyed, business or commercial corporation, *except* a municipal, railroad, *insurance,* or banking corporation might be adjudged an involuntary bankrupt upon default or an impartial trial. Process was duly issued and served upon the insurance corporation, and default being made, an order of adjudication was entered. Upon motion, after the time for appeal had expired, the company moved to vacate the adjudication upon the ground it was null and void since it was an insurance company, not covered by the Bankruptcy Act, and that the court was without jurisdiction. The motion was granted. This court upheld the decision, saying:

> "For a court to extend the act to corporations of either kind" (that is, corporations of the excepted class) "is to enact a law, not to execute one."

The bankruptcy court, if it attempted to deal with the property of these respondents as contended by petitioner herein, it being admitted at and by every step in the bankruptcy proceedings that title was in the Whiteside Estate, or to pass title to their land by the expedient of ordering a party to the proceedings to deliver an escrowed deed contrary to the terms of the escrow to the reorganized corporation, was acting in excess of its statutory jurisdiction, and was enacting a new law, not executing the existing law. To give effect to a judgment

or decree under such circumstances would be to deprive respondents of their property without due or any process of law in contravention of the United States Constitution, as was alleged and urged by respondents before the courts of California.

Noble v. Union River Logging Railroad Co., 147 U. S. 165, 37 L. Ed. 123, 13 S. Ct. 271.

The case of *Stoll v. Gottlieb*, 305 U. S. 165, relied upon by petitioner is clearly not in point. The facts of that case as stated by this court show that Gottlieb was a bondholder of a bankrupt corporation; in other words he was a creditor of that corporation, holding a claim against it. He filed a petition asking that the court vacate its decree confirming the plan of reorganization on the ground of the court's lack of jurisdiction. His petition was denied, and he did not appeal from any of the bankruptcy orders. It was held that the order confirming the plan of reorganization was binding upon him, and since thereunder, a guaranty of the bonds held by him had been released, he was powerless to enforce the guaranty in the state courts of Illinois. There was no question that Gottlieb was a party and he asserted and litigated the jurisdiction of the court to release the guarantors on his bonds. The court adjudged its jurisdiction to release the guaranty existed, and although Gottlieb had the right to appeal, he did not do so.

The mere statement of these facts show the inapplicability of the decision to the facts of the case at bar, where respondents were not creditors of the debtor *but the owners of real property,* and hence not subject to the jurisdiction of the court; where they filed no claims against

the debtor and were not parties to the proceedings; where every act taken and order made recognized the ownership of the land was in them; and where no controversy arose or trial of any kind was had with reference to such ownership.

This court specifically stated in its opinion in the *Stoll* case that:

> "To appraise the cases dealing with status and *transfer of title to real estate* seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and *real estate titles.*"

The case of *Jackson v. Irving Trust Company,* 311 U. S. 494, contains beautiful abstract language about the opportunity to litigate questions, but that case, too, is inapposite. There, there were adversary parties to an action based upon pleadings setting forth the claims of both sides, a trial, a right of appeal, and a determination of a contested matter of jurisdiction.

Petitioner's final plea, based upon these cases, is that respondents had the opportunity to have its title to the land adjudicated, and that therefore it was bound by the decree. Respondents were strangers to the proceedings; no action was contemplated by the plan of reorganization which would have harmed their interests if carried out according to the plan; they were not brought into the proceedings in either a summary or plenary proceeding in an effort to challenge their legal title. Just why should they voluntarily make an issue where none existed and submit themselves to the jurisdiction of that court? The

cases we will hereafter cite relating to the rights of conditional vendors of property justify them in their reliance upon that title.

3. The plea of res judicata is sham.

In the preceding pages we have shown that the bankruptcy court did not adjudge anything with respect to the title of the real property nor attempt to make an adjudication of any fact against respondents herein. Hence, the claim that the final decree of the bankruptcy court was *res judicata* of the issues presented in the quiet title action in California is sham, and need not have been decided by the District Court of Appeal.

We will nevertheless here show without prejudice to the above entitled proposition that the court did not have jurisdiction over respondents herein since they were not parties to the bankruptcy proceedings, and that, whatever the purported effect of the decree upon the title to the property, if any, the decree was not binding upon these respondents.

(a) The Whiteside executors were not parties to the bankruptcy proceeding nor was the Whiteside Estate a creditor required to file a claim in the bankruptcy court.

No claim was ever filed against Pickering Lumber Company by or on behalf of the Whiteside Estate for the balance due under the conditional sale contract of 1927 (R. 175). It is an admitted fact that the Whiteside executors refused to accept any plan of reorganization which would leave the Whiteside notes of 1928 outstanding or which did not provide for the satisfaction of the judgment against the Whiteside Estate in favor of the Whiteside

noteholders based upon their allowed claims against the Whiteside Estate (R. 24-25; 176-177). The amended answer to cross-complaint filed by petitioner herein contains the following allegation:

> "the defendants, as executors of the last will and testament of Robert B. Whiteside, refused to file a written acceptance of said plan of reorganization or to give their consent to compliance by First and American National Bank of Duluth, as trustee, with the provisions of said plan of reorganization." (R. 128.)

By a long line of Federal court decisions it has been determined in the case of conditional sale contracts that property in possession of a bankrupt conditional vendee who invokes Section 77B of the Bankruptcy Act is the property of the conditional vendor; and that neither passage nor application of Section 77B can divest the title of the vendor; and that the conditional vendor is not required to file a creditor's claim, or take any affirmative action with respect to his property unless he desires to reclaim possession of his property during the bankruptcy proceedings.

In re Lake's Laundry, 11 F. Supp. 237, 238;

In re Lake's Laundry, 79 F. (2d) 326, 327-328, 101 A. L. R. 247, certiorari denied in 296 U. S. 622, 80 L. Ed. 422, 56 S. Ct. 144;

In re Burgemeister Brewing Co., 84 F. (2d) 388, 389, reversing 11 F. Supp. 902;

In re White Plains Ice Service, 109 F. (2d) 913;

In re Ideal Laundry, 10 F. Supp. 719-720;

In re Weiss, 10 F. Supp. 227, 229.

The foregoing cases point the fallacy of petitioner's argument that under the final decree the claims of all creditors and stockholders, both those who had, and who had not, filed their claims, were barred from thereafter asserting any claim against the debtor or its property (Pet. 59-60). Respondents have never filed a claim against debtor of any kind or character based on the balance due under said conditional sale contract. The real property was not the property of debtor under the law of California. Respondents' title to the real property was not, and could not be, affected by said final decree or any action of the bankruptcy court. As was said by the United States District Court in and for the Northern District of California, Southern Division, in the apposite case of *In re Ideal Laundry,* supra:

> "It follows, therefore, that the property in question is that of petitioner; it remains the owner, and as such it cannot without its consent be deprived of its property. *It is not a creditor; but it is, under the law of California, the absolute owner of the property under an express reservation of title. Consequently, the provisions of the Bankruptcy Act applicable to creditors are not pertinent, but the rights of petitioner are to be determined by the principles of law governing the rights of owners of property.* The court cannot, therefore, deal with petitioner's property in such manner as to deprive it of the same, and there must be an order granting the petition and permitting petitioner to reclaim its property."

No court has power by the mere force of a decree to annul a deed or establish a title.

> *Hart v. Sansom,* 110 U. S. 151, 155, 28 L. Ed. 101, 103, 3 S. Ct. 586;

Carpenter v. Strange, 141 U. S. 87, 105, 35 L. Ed. 640, 647, 11 S. Ct. 960, 966;

Fall v. Eastin, 215 U. S. 1, 10, 54 L. Ed. 65, 70, 30 S. Ct. 3;

Taylor v. Taylor, 192 Cal. 71, 218 Pac. 756, 51 A. L. R. 1074.

Due process of law "inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

Ochoa v. Hernandez, 230 U. S. 139, 141, 33 S. Ct. 1033, 1041, 57 L. Ed. 1427, 1428;

Ginsberg v. Lindel, 107 F. (2d) 721, 726 (C. C. A. 8);

Regoli v. Fancher, 1 Cal. (2d) 276, 34 Pac. (2d) 477;

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

In *Haggert v. Dewey,* 77 Ark. 527, 92 S. W. 792, 793, 7 Ann. Cas. 333, 334, the court said:

> "A conveyance of land executed by a stranger to the title, or the judgment of a court rendered in a suit between strangers to the title, cannot affect the true owner, and casts no cloud upon title of the true owner. It is not an 'apparent title', nor does it prima facie create a right which the true owner, or even an occupant without title, of land must bring forward evidence to rebut. (Citing cases.) . . .
>
> The same can be said of a decree rendered in a suit between strangers to the title. At most, such a decree serves only to adjudicate the title between these two, or to pass whatever title one may have to the other. It does not cloud the title of the true owner."

A judgment is not *res judicata* as to one not a party to the suit.

United States of America v. Pink, ___ U. S. ___, 86 L. Ed. 459 (advance opinion);

Stone v. Farmers Bank, 174 U. S. 409, 43 L. Ed. 1027, 19 S. Ct. 880.

In *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464, 62 L. Ed. 1215, 38 S. Ct. 566, a state court had held that the defendant was bound by a judgment to which it was neither party nor privy. Reversing this decision this court said (247 U. S. at p. 476):

> "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had the opportunity to litigate the same matter in a former action in a court of competent jurisdiction. (Citing authorities.) The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. (Citing authorities.) And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (citing authorities), *so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.*
>
> It follows that in this case res judicata cannot be regarded as an adequate support for the judgment.
>
> . . .
>
> Judgment reversed. . . ."

(b) Counsel for respondents did not enter a general appearance by virtue of a single statement made at a hearing on the plan of reorganization.

Petitioner claims (Petition pp. 49-54) that respondents entered a general appearance in the bankruptcy proceedings because at a hearing held on the fairness and feasability of the plan of reorganization, after the close of testimony relating thereto, Mr. DeGroat, the attorney for the executors "announced in open court in said District Court of the United States that the executors have only a bare equity, possibly, in the redemption of the Whiteside notes and expressed approval of the plan of reorganization" (R. 175). This violent effort to make a person a party to a proceeding because of an informal remark made by counsel who was present, not as a participant in the proceedings but merely as an interested spectator, is on a par with the equally untenable position taken by counsel in the State Courts that the executory contract for the sale of the land was a deed. If this were to be held to constitute an appearance, any spectator might by some artifice or artful question be caused to make some statement about the proceedings with a consequent claim that he had made a general appearance and was a party. Other than the bare stipulation that the remark was made, the record is silent as to the circumstances attending the making thereof.

Counsel for petitioner neglects to consider that the intention of a person in making a statement or doing some act is what is determinative of the question as to whether there has been an appearance and a submission to the court's jurisdiction. It is respectfully submitted that the record fails to show any such intention on the part of

Mr. DeGroat to submit his clients to the jurisdiction of the court. The record fails to show any participation in the proceedings of the court, the filing of any claim or other paper with the court, or request for any relief. Presumably the statement was made at the invitation of the court or some party to the proceedings. Respondents herein were not creditors, stockholders, or bondholders of the debtor, and had no right to intervene or be made parties to the proceeding. When respondents did wish to invoke the jurisdiction of the court, it was necessary for them to ask leave to file a petition in intervention in the customary manner (R. 310). This petition was later dismissed without prejudice by the court, a fact to which we will advert later.

An appearance is not to be inferred except as a result of *unequivocal acts* from which an intent to do so may properly be inferred.

Durabilt Steel Locker Co. v. Berger Mfg. Co., 21 F. (2d) 139;

Altpeter v. Postal Telegraph-Cable Co., 26 Cal. App. 705, 148 Pac. 241;

Dahlgren v. Pierce, 263 F. 841 (C. C. A. 6);

Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 F. 214 (C.C.A. 6);

Citizens Savings & Trust Co. v. Illinois Central R. Co., 205 U. S. 45, 51 L. Ed. 703, 27 S. Ct. 425.

(c) Respondents did not become parties to the bankruptcy proceeding by filing an intervening petition which was dismissed without prejudice.

We have heretofore set forth at length the facts concerning the filing of this intervening petition and the dis-

missal thereof without prejudice (Respondents' Reply To Petition, pp. 15-17). It will not be necessary to repeat those facts here. The intervening petition, the preliminary order made thereon, and the order dismissing the petition without prejudice appear in the record at pages 310, 326, and 332 respectively. That portion of the opinion of the District Court of Appeal relating to petitioner's claim of *res judicata* and the question as to whether respondents herein became parties to the bankruptcy proceedings so as to be bound by anything contained in the final decree appears at pages 444 to 446 of the record.

Petitioner's principal contention (Pet. 53) is that since the record shows that counsel for both parties stipulated that the order dismissing the intervening petition and the final decree were entered simultaneously (R. 180), therefore respondents were parties when the final decree was entered and are therefore bound by that decree.

This stipulation may not be construed to mean that Judge Reeves held a pen in each hand and affixed each letter of his name to each of these documents at the exact instant.

Nor may petitioner successfully make the unfair contention that because it was stipulated both the order dismissing the intervening petition without prejudice and the final decree were entered simultaneously, respondents were thus parties when the final decree was entered as they do on page 53 of Petitioner's Brief. Such hairsplitting is unthinkable before this august Court. With as much profit we might consider which came first, the chicken or the egg.

If the order and the decree could in fact be made absolutely simultaneously, it might well be contended that respondents ceased to be parties at the moment the decree was entered. They were out of the case at the same time the decree was entered.

However, the application of a little common sense to the situation would seem to be more in order than the uncommon shrewdness and metaphysical exposition manifested in Petitioner's Brief.

One must assume that before concluding the bankruptcy proceeding, the bankruptcy court would first decide any intervention proceeding or ancillary matters, particularly since contrary action might jeopardize the jurisdiction of the court to act at all.

May we further suggest that in a reorganization proceeding the final decree is the order by which the court closes the case. Previously thereto, the court must make all orders which are necessary to dispose of matters pending. Paragraph (h) of Section 77B of the Bankruptcy Act provides:

> "*Upon the termination of the proceedings a final decree shall be entered* discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, *and closing the case.*"

The final decree is the last act within the court's jurisdiction of the proceedings. The final decree itself concluded with the declaration that the bankruptcy proceedings of Pickering Lumber Company "*be and the same are hereby finally and completely terminated and closed.*" Although both the order of dismissal without prejudice

and the final decree were dated the same day, it is an elementary rule of law that it will be presumed that legal instruments bearing the same date will have operation in such order of priority as will effect the obvious results intended within the jurisdiction of the court making the orders.

But the conclusive answer to this whole hairsplitting and irrelevant proposition is already contained in the opinion of the District Court of Appeal where it was pointed out what matters were involved in the petition, and that the order provided that:

> "Except as above provided, said intervention petition be, and it hereby is, dismissed, without prejudice, however, to the rights of said interveners and said respondents with respect to the matters and things alleged in said intervening petition."

In view of this language with what degree of sincerity can it be contended that the final decree and order of dismissal are to be considered as one adjudication of the matters contained in the petition in intervention? Why should a court go through the idle ceremony of dismissing the petition without prejudice if it had already decided the matters referred to in the petition?

It is respectfully submitted that the District Court of Appeal has fairly and accurately stated the facts respecting this contention, and, with a full understanding thereof, has correctly decided that the decree of the bankruptcy court is not *res adjudicata* in this action.

The California District Court of Appeal is not the only court to hold that nothing was adjudicated by the

bankruptcy court and that the final decree entered by it was not *res judicata*. In *First and American National Bank of Duluth v. Whiteside, et al.*, 207 Minn. 537, 292 N. W. 770, the Duluth Bank brought an action against respondents herein to foreclose the stocks and bonds received by it from petitioner herein under the final decree entered in the bankruptcy proceedings. There the Duluth Bank claimed that the final decree in the bankruptcy proceedings of Pickering Lumber Company was *res judicata* and binding on the Whiteside Estate just as petitioner makes the same claim here. The making of the identical claim by petitioner here and the Duluth Bank in the Minnesota courts bespeaks a continuation of their joint effort to despoil the Whiteside Estate. The Supreme Court of Minnesota denied the claim, saying:

> "First we deny plaintiff's claim that the determinative issue is res judicata. The federal court intended to act only to the extent necessary to effect reorganization of the Pickering Company. True, the final decree in reorganization stated that the securities were to be held by plaintiff 'in lieu of the collateral' under the bank's agreement with Whiteside. But the intention was merely to effect the exchange between the bank and the Pickering Company. To hold that it adjudicated rights between the bank and the Whiteside estate would ignore the fact that the latter's complaint in intervention had been dismissed without prejudice because the courts of Minnesota were considered the proper forum for decision of the indicated and reserved questions."

If the final decree was not *res judicata* as to the Whiteside Estate based on the intervention of respondents herein where that intervention made the Duluth Bank

and Whiteside noteholders adverse parties, with what degree of plausibility or sincerity may petitioner herein claim *res judicata* when no claim against the estate of the debtor was asserted by the Whiteside executors.

In addition to the requirement of identity of parties, it is well settled that the principle of *res judicata* is only applicable to the point adjudged and not to points only collaterally under consideration, or incidentally under cognizance, or only to be inferred by arguing from the decree.

North Carolina Railroad Co. v. Story, 268 U. S. 288, 294, 69 L. Ed. 959, 45 S. Ct. 531;

Title Guarantee & Trust Co. v. Monson, 11 Cal. (2d) 621, 632, 81 Pac. (2d) 944, 950;

Beronio v. Ventura Lumber Co., 129 Cal. 232, 236, 61 Pac. 958;

Watson v. Poore, 18 Cal. (2d) 302, 309-310, 115 Pac. (2d) 478.

In *Brunswick Tire Corp. v. Credit Tire Stores Inc.,* 8 Cal. App. (2d) 69, 46 Pac. (2d) 804, the appellant contended that the decision of an Arizona court dismissing an action "without prejudice" was *res judicata* in the subsequent action. Affirming the judgment in the subsequent action *on motion,* the court laconically stated (8 Cal. App. (2d) at p. 70):

> "The record before us shows that the case in Arizona was dismissed 'without prejudice'. There is no merit in this appeal."

The only adjudication by a dismissal without prejudice is that nothing is adjudged.

Fleishbein v. Western Auto Supply Agency, 19 Cal. App. (2d) 424, 427, 65 Pac. (2d) 928, 929;

Harrison v. Remington Paper Co., 140 F. 385, 399, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314;

Krauthoff v. Kansas City Joint Stock Land Bank, 31 F. (2d) 75, 77 (C. C. A. 8).

In the case of a dismissal without prejudice, such judgment is not on the merits and is not a bar to a subsequent action. Such a dismissal without prejudice determines that the parties are left as free to litigate every issue in the action dismissed as they would have been if it had never been commenced.

Fidelity & Deposit Co. of Maryland v. Port of Seattle, 106 F. (2d) 777, 781 (C. C. A. 9);

Petri v. Manny, 99 Wash. 601, 170 Pac. 127, 128, 1 A. L. R. 1595.

A trial upon which nothing was determined cannot support a plea of *res judicata,* or have any weight as evidence at another trial.

Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 27 L. Ed. 878, 880, 3 S. Ct. 99;

Gardner v. Michigan Central R. Co., 150 U. S. 349, 356, 37 L. Ed. 1107, 1109, 14 S. Ct. 140;

Snare & Triest Co. v. Friedman, 169 Fed. 1, 40 L. R. A. (N. S.) 367, 374;

Harna-Smith Co. v. School District of Scranton, 44 F. Supp. 860, 863;

Lynch v. Lynch, 124 Cal. App. 454, 462, 12 Pac. (2d) 741.

The cases cited on page 50 by petitioner to their proposition that by attempted intervention of respondents they became parties to the proceedings for all purposes are not in point.

Typical of those cases is *Alexander & Hillman,* where the court held that by appearing in a federal receivership proceeding in a state other than his residence, and presenting and proving his claim to share in the distribution of the assets of the corporation, a corporate officer or director submits himself to the jurisdiction of the receivership court for the adjudication of his liability on account of corporate assets fraudulently obtained and wrongfully withheld by him, under an ancillary bill filed by the receivers setting up such liability as a counterclaim against him, without the service of process.

In the case at bar respondents made no claim against the debtor or any of its property or assets, asserted no right against debtor, and after being permitted to file an intervening petition against the Duluth Bank and Whiteside Noteholders Committee, they were dismissed without prejudice. The facts are entirely different.

French v. Gapen is likewise not applicable to the situation presented here where respondents were dismissed without prejudice. The case is, however, definitely authority for respondent's contention that no title to the property in question passed by virtue of any decree or order made in the bankruptcy proceedings, and that the court did not and could not adjudicate title against respondents, since they were not parties. Sketching the facts rapidly: The State of Indiana built a canal and granted certain property rights and easements affecting the property to several persons. It then passed title to the property to trustees who were given the power to sell the canals. Gapen, a stockholder, brought suit against

the trustees to have the venture liquidated and the proceeds distributed to him and other canal stockholders. The persons having property rights in the canals were not made parties, but filed intervening petitions setting up their property rights after a sale had been made and confirmed, but before the proceeds had been distributed. The petitions were dismissed, after demurrers sustained. The decrees dismissing the petitions were reversed, this court saying:

> "It only remains to consider whether the petitioners are entitled to relief in this suit and under the form of proceeding they have adopted.
>
> They were not originally parties to the suit. *No sale of the trust property could be made in their absence which would dispose of their rights.* All that could pass under such a sale would be that which was conveyed by the State to the Trustees, to-wit: the canal, etc., subject to the prior rights of the petitioners. *No decree binding on the petitioners could be rendered, defining what their rights actually were.* A purchaser would take only what the Trustees held, and be left to settle with the petitioners as best he could.
>
> But while the petitioners were not, in fact, parties, they might with propriety have been made such, and there cannot be a doubt that if they had intervened before the decree of sale, and asked to be made defendants, it would have been within the power of the court, with the consent of the complainants, to take them in. The case did go on without them, presumably because it nowhere appeared until their intervention that there were any such outstanding rights as they claim."

The remaining cases cited by petitioner in connection with its claim that by the attempted intervention of respondents they became parties to the proceedings for all purposes do not involve the facts presented here where both interveners and respondents were dismissed without prejudice. *When a petition in intervention is dismissed without prejudice, the intervener is in the same position as if he had never intervened.* The situation is the same as if he had applied for leave to intervene and leave to intervene had been denied. Here, by the dismissal without prejudice, all rights of both interveners and respondents therein were reserved.

A dismissal of a petition in intervention filed in a bankruptcy proceeding under Section 77B of the Bankruptcy Act, after leave given to intervene, is a denial of the right to intervene and participate as parties, and an attempted appeal from the final decree by the attempted interveners will likewise be dismissed.

In re Kenmore-Granville Hotel Co., 92 F. (2d) 778 (C. C. A. 7), certiorari denied in 302 U. S. 767, 82 L. Ed. 596, 58 S. Ct. 481.

From the foregoing facts and cases it is very clear that respondents herein were not parties to the bankruptcy proceedings, and hence nothing decided therein is binding upon them. The plea of *res judicata* is sham.

Due process of law "inhibits the taking of one man's property and giving it to another, contrary to settled usage and modes of procedure, and without notice or an opportunity for a hearing".

Ochoa v. Hernandez, 230 U. S. 139, 141, 57 L. Ed. 1427, 1428, 33 S. Ct. 1033, 1041;

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565;
Ginsberg v. Lindel, 107 F. (2d) 721, 726 (C. C. A. 8);
Regoli v. Fancher, 1 Cal. (2d) 276, 34 Pac. (2d) 477.

Nothing short of notice and hearing is due process and due process is required in a bankruptcy court as well as in a court of general jurisdiction.

Coates v. Maguire Oil & Refining Corp., 47 Cal. App. (2d) 275, 279, 117 Pac. (2d) 898.
Henderson v. American Service Co., 35 F. Supp. 732.

The District Court of Appeal decided this cause upon two propositions of law, first, that the contract of sale of 1927 was not a deed, and, second, that the deed which had been put in escrow at the time the contract was entered into had been delivered in violation of the terms of the escrow agreement. Determination of the legal effect of the contract and decision as to whether a deed delivered by an escrowee contrary to the terms of the escrow agreement required the application of the local law of California. The fact that the escrowee acted upon the order of a bankruptcy court did not make the question of the validity of the delivery a federal question in that the final decree does not purport to adjudge that the title of the Whiteside Estate was thereby vested in the reorganized corporation; nor otherwise a determination of the title. The decision of the state court does not purport to decide whether the federal court had power to order the Duluth Bank to make the delivery, but only de-

cides what effect under the circumstances the delivery had upon the title to the land under California law.

Promis v. Duke, 208 Cal. 420, 281 Pac. 613;

Regoli v. Fancher, 1 Cal. (2d) 276, 34 Pac. (2d) 477.

CONCLUSION.

In conclusion it is respectfully submitted that the Petition for Writ of Certiorari should be denied for each and all of the reasons hereinbefore set forth.

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. (Supreme Court Rules, Rule 38 (5).) It is apparent from the facts of this case, and the law declared in the opinion of the District Court of Appeal of the State of California, that the decision is based upon the law of California relating to real property located in that State, and that no substantial Federal question has been necessarily decided by the State Court in a way not in accord with the decisions of this Honorable Court.

The decision sought to be reviewed is correct in law, and is fair and equitable to all parties concerned. The final paragraph thereof reads as follows:

> "The judgment is reversed with directions that a judgment be entered adjudging defendants to be the owners and holders of title to the lands described in the complaint, subject, however, to a lien thereon for any unpaid remainder of the Whiteside notes, and subject, further to the terms and conditions of the contract of purchase of January 5, 1927."

Respondents were entitled to nothing less than that which was granted them by the judgment. Petitioner was entitled to nothing more.

Dated, San Francisco, California,
January 29, 1943.

Respectfully submitted,
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IVORES R. DAINS,
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HERBERT A. DANCER,
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Of Counsel.

No. 633.

In the Supreme Court of the United States

October Term, 1942.

PICKERING LUMBER CORPORATION, *Petitioner*,

vs.

SOPHIA WHITESIDE, ROGER V. WHITESIDE, WILLIAM C. ROBINSON and JOHN D. LAMONT, as Executors of the Last Will and Testament of Robert B. Whiteside, deceased, *Respondents*.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT.

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No. 633.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT.

Comes now Pickering Lumber Corporation, petitioner, and respectfully prays for a reconsideration by the Court of its order entered February 15, 1943, denying certiorari herein and upon such reconsideration that said order denying certiorari be vacated and writ of certiorari be granted.

This is a plain case where the court below, in the rendition of its judgment, has wholly disregarded a final decree rendered by a bankruptcy court and other bankruptcy proceedings in the reorganization of Pickering Lumber Com-

pany which were specifically set up and claimed by petitioner in the court below and, as a consequence, a federal question reviewable under Section 237(b) of the Judicial Code as amended (28 U. S. C. A. Sec. 344b) is presented. The question is, where claims for the entire unpaid balance of purchase price owing by Pickering Lumber Company, a debtor in reorganization proceedings, on a contract for the purchase of timber lands, as filed by the assignees thereof, are allowed by the bankruptcy court, satisfaction of such claims is duly made by acceptance of securities delivered to such assignees in accordance with the plan of reorganization, which was accepted by them and confirmed by the court in such bankruptcy proceedings, and which plan provides that such assignees shall transfer title to petitioner and such title is transferred and all claims against the debtor in the bankruptcy proceedings and petitioner are barred, may the court below, where such satisfaction, final decree and the vesting of title and the right, title, privilege or immunity conferred thereby and by Section 77B of the Bankruptcy Act (11 U. S. C. A. Sec. 207) were specifically set up and claimed by petitioner, disregard such final decree, satisfaction and barring of claims and treat the case precisely the same as if bankruptcy proceedings had never intervened.

The refusal of the Court to grant certiorari will result in unnecessary uncertainty as to rights conferred and obligations discharged in corporate reorganizations under the Federal Bankruptcy Act. The review of this case involves questions of substantial public importance in the administration of the Bankruptcy Act dealing with the reorganization of corporations. Denial of certiorari will adversely affect the administration of the bankruptcy laws relating to the reorganization of corporations because in the decision sought to be reviewed a state court has denied effect to a final decree vesting title to property and barring

claims rendered by a bankruptcy court in a reorganization case where the bankruptcy court admittedly had jurisdiction of the parties and the subject matter and by its judgment the state court has given the same recognition to the rights of a creditor and has imposed an obligation upon the reorganized corporation precisely the same as if bankruptcy had not intervened. The entire claim upon which respondents' title was based was satisfied by distribution of securities to the assignees to whom and only to whom payment could be made because of an assignment thereof executed by respondents' decedent. The judgment of the court below treats as invalid the final decree of a bankruptcy court rendered in proceedings where the precise obligation in suit was allowed and satisfied and gives to such discharged claim the same force as if such satisfaction had not been made and such final decree entered. If this Court refuses certiorari ir such a plain case wherein neither the Act nor the bankruptcy court's final decree have been given effect, then rights conferred in bankruptcy proceedings under the reorganization provisions of the Bankruptcy Act and its administration will be rendered uncertain. A reconsideration of the instant case will make this plain.

Before particularizing with citations to the record we summarize. In brief, First and American National Bank of Duluth, Minnesota, and a Noteholders' Committee, were assignees of respondents' decedent, Robert B. Whiteside, under a written assignment executed by him and his wife covering the entire unpaid balance owing by Pickering Lumber Company under a timber purchase contract dated January 5, 1927, entered into between it and respondents' decedent. As such assignees the Bank and the Committee filed and were allowed claims in the bankruptcy proceedings of Pickering Lumber Company for such unpaid pur-

chase price. Such assignments were executed by respondents' decedent to secure the payment of notes executed by him which were in precisely the same principal amount and bore the same rate of interest as the unpaid balance on the purchase contract. The claims of the respective assignees for the entire unpaid balance of purchase price as allowed by the bankruptcy court were satisfied by the delivery of securities to the assignees in the amount which each was entitled, and the plan of reorganization was duly accepted by them. First and American National Bank, one of the assignees, held in escrow the deed executed by respondents' decedent and his wife, conveying the property to Pickering Lumber Company, which was to be delivered by the Bank to it upon payment of the balance of the purchase price. In accordance with the plan of reorganization and the final decree, the Bank, upon satisfaction of the claims for the balance of the unpaid purchase price, delivered the deed to petitioner, which was organized in pursuance of the plan. Both by the plan and final decree petitioner acquired title to the property covered by the purchase contract and to all of the properties of Pickering Lumber Company free and clear of all of its debts and liabilities.

The judgment of the court below (R. 447) directs:

> "that a judgment be entered adjudging defendants (respondents) to be the owners and holders of title to the lands described in the complaint, subject, however, to a lien thereon for any unpaid remainder of the Whiteside notes, and subject, further, to the terms and conditions of the contract of purchase of January 5th, 1927." (Parenthetical expression ours.)

This judgment ignores and gives no effect to the plan of reorganization which was confirmed by the court and which provides that:

"The holders of these notes (the Whiteside notes) will receive Income Bonds, Series 'B,' in the sum of $105,000, 1,950 shares of Convertible Preferred Stock and 3,000 shares of Common Stock and will transfer title to the Whiteside tract to the Reorganized Company." (R. 64.) (Parenthetical expression ours.)

This judgment ignores and gives no effect to the following provisions of the final decree:

(a)

"8. That First and American National Bank of Duluth shall deliver to Pickering Lumber Corporation, when organized, the deed held by it in escrow under the agreement between Robert B. Whiteside and Sophia Whiteside and the debtor dated January 5, 1927, and the securities to be issued as provided in said Plan of Reorganization in exchange for said deed shall be delivered to said First and American National Bank of Duluth, to be held by said Bank in lieu of the collateral represented by said contract dated January 5, 1927, and the payments due thereunder." (R. 331.)

(b)

"9. That the title to all of the assets and property of every kind and nature whatsoever which by reason of the pendency of this proceeding was vested in T. M. Barham and Clifford Histed, as Trustees herein, by order of this Court or general provision of law, be and the same hereby shall be vested in Pickering Lumber Corporation, a Delaware corporation to be organized as hereinabove set forth, free and clear of any lien or claim of any kind or nature * * *." (R. 331.)

(c)

"4. That the Debtor, Pickering Lumber Corporation, the corporation to be organized under the laws of Delaware, to consummate the Plan, and their successors and assigns, be and they hereby are dis-

> charged from all debts, claims or liabilities of every kind and nature whatsoever of said Debtor, or against the property of said Debtor, whether or not such claims have been filed herein, and all rights and interests of creditors and stockholders of the Debtor or against the property of the Debtor, are hereby terminated and ended other than those contracts which have not heretofore been rejected;" (R. 329-30.)

It is entirely clear that the court below, in directing that judgment be entered that respondents were the owners of the real estate, refused to give effect to the specific provisions of the plan of reorganization and the final decree under which title to the property in question was vested in petitioner and all claims against Pickering Lumber Company, the debtor, or petitioner, were barred regardless whether such claims were filed or not. The court below thereby has refused to give any effect whatsoever to these specific provisions of the plan of reorganization and the decree granting a discharge and vesting title. A stronger case for a denial of a right, title, privilege or immunity within the meaning of Section 237(b) of the Judicial Code, as amended, is difficult to imagine. Likewise the judgment of the court below eloquently spells out the necessity of granting certiorari in order to prevent unnecessary uncertainty as to the effect of a corporate reorganization under the Bankruptcy Act and that there is involved in this case a substantial question of public importance in the administration of the Bankruptcy Act. If state courts are to be permitted to disregard a duly confirmed plan of reorganization and a final decree in bankruptcy vesting title to property and barring claims, then the Bankruptcy Act as to corporate reorganizations cannot accomplish its objectives.

The claims for the unpaid balance of the purchase price under the contract of January 5, 1927, and their satisfaction in the bankruptcy proceedings.

On January 5, 1928, Robert B. Whiteside issued $400,000.00 principal amount of notes under a collateral trust indenture of that date (R. 184-205) and concurrently with the execution thereof executed an assignment providing (R. 206):

> "do hereby sell, assign and transfer to the First National Bank of Duluth, as Trustee and as security * * *, all their right, title and interest and the right, title and interest of each of them in and to the sum of Two Hundred Thousand Dollars ($200,000.00) due January 5, 1930, * * *, and Two Hundred Thousand Dollars ($200,000.00) due January 5, 1931, * * * payable to Robert B. Whiteside by Pickering Lumber Company, a Delaware corporation, under the provisions of a certain agreement dated January 5, 1927, between the undersigned, as vendors, and the said Pickering Lumber Company as purchaser, and also all of the rights, of first parties covered by said agreement insofar as the same may be necessary or applicable to enforcing payment of said amounts from Pickering Lumber Company."

Subsequent to the execution of the assignment and before the petition in bankruptcy was filed by Pickering Lumber Company on November 30, 1934, it paid to the assignee $300,000.00 of the unpaid balance of the purchase price, leaving $100,000.00 of the unpaid balance of the purchase price subject to such assignment (R. 177).

On July 5, 1928, Whiteside issued $200,000.00 of his notes under a collateral trust indenture with the First and American National Bank of Duluth (R. 207-212) and on the same day executed an assignment covering $200,000.00 of the unpaid balance under the purchase contract due

January 5, 1932, (R. 213) and containing identically the same provision as the first assignment except as to the amount assigned.

There was unpaid on the purchase contract at the time the bankruptcy proceedings were instituted $100,000.00 covered by the assignment of January 5, 1928, and $200,000.00 covered by the assignment of July 5, 1928, which was identically the same amount due under the Whiteside notes (R. 170). Both the notes and the unpaid balance on the timber purchase contract bore interest at the rate of 6% per annum from December 23, 1929 (R. 170).

The First and American National Bank of Duluth filed claim in the bankruptcy proceedings for $100,000.00 of the unpaid balance on the purchase contract, which was identically the same amount as the unpaid balance on the Whiteside notes dated January 5, 1928 (R. 241-43). It was asserted in the claim (R. 242):

> "Payment of all said notes was secured also by that certain agreement * * *, which agreement by its terms assigned to said the First National Bank of Duluth, as Trustee, and as security to the notes hereinabove referred to, all the right, title and interest of said Robert B. Whiteside and Sophia Whiteside, his wife, in and to the sum of $200,000.00 due January 5, 1930, with interest thereon, and $200,000.00 due January 5, 1931, with interest thereon, payable to Robert B. Whiteside, by Pickering Lumber Company, under the provisions of that certain agreement dated January 5, 1927, between said Robert B. Whiteside and Sophia Whiteside, his wife, as vendors, and said Pickering Lumber Company, as purchaser, a copy of which agreement is hereto attached, marked Exhibit 2 and made a part hereof.
>
> "Under and by virtue of said agreement Exhibit 1 (the collateral trust agreement) and said agreement Exhibit 2, (the assignment) the above named

debtor, Pickering Lumber Company, was at the time of filing its petition for reorganization under Section 77B of the Bankruptcy Act as amended and still is justly and truly indebted to said First and American National Bank of Duluth, as Trustee under Collateral Trust Agreement dated January 5, 1928, * * * in the principal sum of $100,000.00 plus interest thereon at the rate of 6% from the 5th day of January, 1932, payable semi-annually on January 5th and July 5th of each year, according to the provisions of said agreement Exhibit 2, until the principal sum and interest as aforesaid are paid in full." (Parenthetical expression ours.)

A claim was also filed by the Noteholders' Committee duly constituted by the holders of the July 5, 1928, notes (R. 262-4) for $200,000.00 of the unpaid balance of the purchase contract, in which was incorporated by reference similar allegations made in the claims filed by the Bank (R. 262), shown (R. 255).

The claims of the First and American National Bank covering the assigned purchase price of $100,000.00 and the claim of the Noteholders' Committee covering the $200,000.00 assigned purchase obligation, constituting the entire unpaid balance of purchase price under the purchase agreement, were duly allowed by the bankruptcy court on February 19, 1937 (R. 177). Thus, the First and American National Bank and the Noteholders' Committee, as assignees, respectively, were allowed claims covering the entire unpaid balance on the purchase contract.

These claims were duly classified in the order classifying claims as class 3 claims (R. 298), a provision was made for their satisfaction (R. 64), and the securities as provided in the plan of reorganization, to be delivered in satisfaction of these claims, were delivered to the First and American National Bank and to the Bondholders' Com-

mittee in the proportions to which they each were entitled, respectively (R. 181). Deed to the lands was deposited with the Clerk in pursuance of the order of the bankruptcy court (R. 334) and afterwards, on order of the court, the deed was delivered to petitioner (R. 335-6).

Respondents' Admissions as to the Assignments.

In their inventory of the Robert B. Whiteside estate filed in the Probate Court of St. Louis County, Minnesota, respondents included the unpaid balance on the purchase contract as an asset and stated (R. 390):

> " 'Note: This contract was assigned by Collateral Trust Agreement to the First and American National Bank—Duluth as security for Collateral Trust 5½% Gold Notes of R. B. Whiteside and on which there remains unpaid $300,000.00, and is subject to balance of mortgage to Detroit Trust Co. for $300,000.00 which the Pickering Lumber Co. assumed as a part of the purchase price.' " [1.*]

In their petition filed in the Probate Court of St. Louis County, Minnesota, respondents alleged (R. 286):

> "That sometime prior to his death decedent assigned, transferred, and delivered unto the First and American National Bank of Duluth, Minnesota, the said contract, and the balance of the purchase money owing to him thereon, to-wit: the sum of $300,000.00, in trust as security for the payment of the decedent's promissory notes in like amount, * * *"

It was also asserted therein by respondents (R. 289):

> "That by reason of the facts and circumstances hereinbefore related, your petitioners have a bare

1.* This mortgage was satisfied in the reorganization proceedings (R. 330).

equity of redemption in and to the security of said contract and therefore have no claim to make or file in said reorganization proceedings (bankruptcy proceedings of Pickering Lumber Company), all of said contract indebtedness having been assigned by the decedent in his lifetime, and due claims therefor having been made, filed and allowed by the holders thereof as aforesaid; * * *" (Parenthetical expression ours.)

In their intervening petition filed in the bankruptcy court respondents asserted in paragraph 24 (R. 322):

"That at the time of the institution of the proceedings for the reorganization of Pickering Lumber Company on November 30, 1934, the interveners were creditors of said Pickering Lumber Company under and by the terms of said purchase agreement dated January 5, 1927, in the amount of $300,000, together with interest thereon in accordance with the terms of said agreement and the extension agreements hereinbefore referred to, subject only to the hypothecation, pledge and assignment of said indebtedness to the respondent, First and American National Bank of Duluth, as trustee, to secure said outstanding collateral trust notes of said Robert B. Whiteside."

Respondents not only had knowledge of the intended satisfaction to be made of the obligation of Pickering Lumber Company on the purchase contract but participated in the proceedings in the bankruptcy court, and invoked the jurisdiction of that court to consummate the plan under which title to the lands was to be transferred to petitioner.

Respondents specifically stated in their petition in the Probate Court (R. 288):

"That said Bondholders' Protective Committee has made and submitted to all of the creditors of Picker-

ing Lumber Company a tentative reorganization plan under Section 77B of the National Bankruptcy Act, a copy whereof is hereunto annexed, marked Exhibit 'A,' and made a part hereof; wherein and whereby the indebtedness of said corporation upon said timber purchase contract is recognized and provision therein is made as therein shown on pages 12 and 13, under subheads B and C, for distribution of certain new securities unto the holders of the said obligations of decedent proven and allowed as aforesaid, *and in discharge thereof*, to which reference is made for greater particularity.

That thereupon an order of said court was duly made under date of December 3, 1936, granting leave to file said plan of reorganization in said court, and ordering and directing all claims of claimants and creditors of said bankrupt be proven and filed with the clerk of said court on or before December 26, 1936, and otherwise providing for the admission and allowance of said claims; whereof due notice was given to the creditors, a copy of which notice is hereunto annexed, marked Exhibit 'B' and made a part hereof. That pursuant to the directions of said order due proofs have been made in said proceeding of the several indebtednesses of said bankrupt on the part of the holders of said mortgage of Detroit Trust Company, and the indebtedness secured thereby, and of the First and American National Bank as trustee, and the holders of said notes of the decedent, or their due representatives; which said claims in virtue of said order stand admitted and allowed." (Italics ours.)

It was alleged by respondents that February 19, 1937, had been fixed by the bankruptcy court as the date for consideration of the confirmation of the plan (R. 29). Upon that date the confirming order was entered (R. 302) which provided:

"(c) All creditors of and claimants against the Debtor, whether secured or unsecured whether or not

affected by the Plan, whether their claims be *ex contractu* or *ex delicto,* whether their claims have been filed or not, and including creditors and claimants who have not, as well as those who have, accepted said Plan of Reorganization."

It was further provided in the confirming order (R. 301):

"(i) That all of the property and assets of the Debtor of every kind and character and wheresoever situated, constitute the property which is dealt with by the Plan of Reorganization;"

Respondents' Intervention in the Bankruptcy Proceedings.

When First and American National Bank of Duluth, Minnesota, sought to sell the assigned timber purchase contract indebtedness, respondents intervened in the bankruptcy proceeding, praying that the threatened sale be enjoined. They invoked the jurisdiction of the court on the ground that should such sales take place and (R. 324)

"unless the purchaser or purchasers, whoever it or they might be, at such sales, should they take place, be willing to carry out said Plan of Reorganization of said Pickering Lumber Company, it will be impossible to consummate and carry out said Plan of Reorganization and that, therefore, the action of said trustee, in advertising said indebtedness and rights for sale, is a threat to the consummation of said Plan of Reorganization and in dereliction of its assent to said Plan of Reorganization heretofore filed in this Court and in violation of such acceptance."

The bankruptcy court enjoined the sales by an order entered March 17, 1937, (R. 326-7) and on March 27, 1937, the same date the final decree was entered (R.

327-332), the bankruptcy court entered an order affirming the injunction previously granted but dismissed the intervening petition without prejudice as to the controversies therein between respondents and the First and American National Bank of Duluth, Minnesota, as to whether or not the Bank should satisfy its claims on the Whiteside notes allowed against the Whiteside estate (R. 333). There was never any contention by anybody that the effect of the execution of the plan of reorganization would not vest title to the real estate in the petitioner.

Conclusion.

The record is undisputed that claims for the entire unpaid balance of the purchase price owing on the purchase contract by Pickering Lumber Company were satisfied by satisfaction effected with the assignees thereof who were the only persons with whom such satisfaction could be lawfully made. The satisfaction and discharge of the obligation for the payment of the unpaid balance of the purchase price on the purchase contract as made in the bankruptcy proceedings has been treated by the court below as being wholly ineffective to accomplish a discharge. The plan of reorganization and the final decree of the bankruptcy court barring claims and vesting title to the real estate in question has been ignored by the judgment of the court below.

We submit that a substantial question of public importance is involved and that the refusal of this Court to grant certiorari will result in unnecessary uncertainty in the administration of the reorganization provisions of the Bankruptcy Act. This Court clearly has jurisdiction under Section 237(b) of the Judicial Code, as amended, and the cases cited in petitioner's brief to grant certiorari.

It is therefore respectfully submitted that the order of his Court entered February 15, 1943, denying certiorari e vacated and upon reconsideration that the writ of ertiorari issue.

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PAUL BARNETT,
HENRY N. ESS,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that this petition is presented in good aith and not for delay.

HENRY N. ESS,
Counsel for Petitioner.